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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 885

JOHN E. PARKS, JR., AND ROBERT M. FOOTE AND ALBERT McHUGH AND PAUL ZIEGLER AND SILVIO STAMERRO, INDIVIDUALLY AND AS REPRESENTATIVES OF THE MEMBERS OF LOCAL 28, IBEW, IN A CLASS ACTION AND LOCAL UNION 28, IBEW,

Petitioners,

V.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND LOCAL UNION NO. 24 (IBEW),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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This case raises questions of construction of federal labor statutes which are of the highest importance and urgently require settlement by this Court. As in the past generation, the protection of labor unions and employers in their relationship to each other were the chief problems of labor law, so currently the chief problem in this field is the protection of the individual union member in his relationship	

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to his union. Concern over this problem has culminated in the Landrum-Griffin Act of 1959. The instant case is the first opportunity of this Court to clarify the following fundamental questions as to both substantive rights and the scope of federal jurisdiction under this act and related labor statutes, which immediately and vitally affect not only the 1400 members of Local 28, IBEW, and the 150,000 IBEW members in the electrical construction industry, but also the millions of rank and file members of all American labor unions 21

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JOHN E. PARKS, JR., AND ROBERT M. FOOTE AND ALBERT McHUGH AND PAUL ZIEGLER AND SILVIO STAMERRO, INDIVIDUALLY AND AS REPRESENTATIVES OF THE MEMBERS OF LOCAL 28, IBEW, IN A CLASS ACTION AND LOCAL UNION 28, IBEW,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND LOCAL UNION NO. 24 (IBEW),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John E. Parks, Jr., et al., individually and as representatives of the members of Local 28, International Brotherhood of Electrical Workers (IBEW) and Local Union 28, IBEW, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on January 23, 1963.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals, not yet officially reported, are printed at pp. 1-78

and 78-82 respectively of the appendix to this petition.* The opinion and supplemental opinion of the District Court are reported in 203 F. Supp. 288 (1962) and are printed at Jt. App. 1-47.

JURISDICTION

The final order of the Court of Appeals was entered on January 23, 1963. No rehearing was requested. The mandate has been stayed pending the disposition of the case by this Court. The jurisdiction of this Court arises under Title 28 U.S.C. §1254.

QUESTIONS PRESENTED

By Petitioners

1. Whether the majority of the Court of Appeals erred in concluding, contrary to the District Court, on the evidentiary facts found by both courts, that the International President (IP) of the IBEW did not violate his fiduciary duty under §501(a) of the Landrum-Griffin Act in revoking the charter of Local Union 28 for engaging in a strike without his consent, although, among other things, (a) the local was forced to strike because the IP, while professing his support to the local in the local's collective bargaining, made a secret deal with the employers, behind the local's back, which the International conceded "wasn't doing a very good job for labor" if made (Jt. App. 381), and which destroyed any chance of the local to bargain a fair agreement; and (b) one of the reasons for revoking the charter was a desire to punish the members of the local because the local's leaders had successfully sued the International under Landrum-Griffin?

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* Numerical references preceded by "App." are to the appendix to this petition. References to "Jt. App." are to the Joint Appendix in the Court of Appeals, of which nine additional copies have been filed with this petition.

2. Whether the majority of the Court of Appeals erred in holding legal and proper the IP's objective in bringing revocation proceedings against Local 28, namely to force the local to vote to direct its collective bargaining team to submit to dictation of the terms of a new collective bargaining agreement by the Council on Industrial Relations (CIR) of the Electrical Contracting Industry (consisting of an equal number of representatives, including the IP, of the IBEW and of the National Electrical Contractors Association (NECA)), which, with the approval of the IP had passed a secret resolution, pursuant to which the local's new contract would contain a no-strike provision, and could never be terminated or changed in any respect without the consent of the Maryland Chapter of NECA or the unanimous consent of the CIR?

3. Whether the majority of the Court of Appeals erred in reversing the District Court's conclusion that the revocation of the local's charter was invalid for failure to accord a full and fair hearing as required by §§101(a)(5) and 609 of the Landrum-Griffin Act, where the IP brought and heard the charges; refused to testify although the defense was based on the impropriety of his own conduct in the matter out of which the charges arose; and advised, out of the presence of the local's representatives, with the general counsel of the IBEW, who conducted the proceedings on behalf of the IBEW?

4. Whether the courts below erred in holding that the revocation of Local 28's charter, and the immediate chartering, pursuant to a plan, of a new and subservient local for the same jurisdiction, in which the prior democratically elected leadership was ousted by strict limitation of the persons eligible to nominate, in favor of leadership handpicked and completely dominated by International, did not constitute a trusteeship (defined by §3(h) of Landrum-Griffin as "any receivership, trusteeship or other method)

of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution and by-laws"), as to which §304 of that act grants federal jurisdiction over actions by members of the local challenging the reasons for such supervision?

5. Whether the courts below erred in holding, notwithstanding the nonavailability before the NLRB of the broad relief sought in this case and the relevance of certain factual issues to ultimate questions in the instant case broader than unfair labor practices as such, that the District Court was correct in refusing to make any findings whatsoever on such issues, because such findings may have been to the effect that there had been certain conduct (a) on the part of a party, and (b) on the part of persons not parties to the instant litigation, which was prohibited by the unfair labor practice provisions of the NLRA as amended?

6. Whether, because of the IP's violation of his fiduciary obligation and his bad faith and illegal purposes in connection with the strike for which the local's charter was revoked, the leaders of the local should be immune from disciplinary action by International for their part in the strike?

7. Whether the local is entitled to damages and all plaintiffs to counsel fees?

Additional Questions in the Case

8. Whether the courts below correctly held that the federal courts have jurisdiction over a suit by a local union against its International for violation of the International Constitution in revoking the local's charter, on the ground that the constitution is a "contract . . . between . . . labor organizations" within §301(a) of the Taft-Hartley Act?

9. Whether the courts below correctly held that members of the local whose charter was revoked by Interna-

tional are themselves "disciplined" by such revocation within the meaning of §§101(a)(5) and 609 of Landrum-Griffin, giving the right to bring action in the federal courts to members disciplined without a full and fair hearing or for exercise of rights granted by Landrum-Griffin?

10. Whether the courts below correctly held that the Norris-LaGuardia Act did not preclude injunctive relief under §301(a) of Taft-Hartley, compelling the restoration of Local 28's charter?

11. Whether the courts below correctly held that the power of the federal courts to give relief against union discipline which violates the union constitution as well as the fiduciary obligations of the IP are not pre-empted by the NLRB's jurisdiction merely because certain aspects of the conduct of the IP may arguably be unfair labor practices.

STATUTES INVOLVED

The following statutes involved are printed as follows:

Landrum-Griffin Act (LMRDA)
§2, 29 U.S.C. §401, App. 83.
§3(h), 29 U.S.C. §402(h), App. 71 n. 74.
§101(a)(4), 29 U.S.C. §411(a)(4), App. 84.
§101(a)(5), 29 U.S.C. §411(a)(5), App. 67 n. 63.
§101(b), 29 U.S.C. §411(b), App. 84.
§302, 29 U.S.C. §462, App. 84.
§304(a), 29 U.S.C. §464(a), App. 72.
§304(c), 29 U.S.C. §464(c), App. 71-2, n. 75.
§501(a), 29 U.S.C. §501(a), App. 85.
§609, 29 U.S.C. §529, App. 67, n. 64.

NLRA §8(d), 29 U.S.C. 158(d), App. 85.

LMRA ("Taft-Hartley") §301(a), 29 U.S.C. §185(a), App. 54.

Norris-LaGuardia Act, 20 U.S.C. §101 et seq. App. 60-61, n. 55.

STATEMENT OF THE CASE

THE PROCEEDINGS BELOW

The Nature of the Cases

These are consolidated cases brought by Local 28, IBEW, and its members as a class: (1) to set aside the revocation of the local's charter by the International President (IP) of the IBEW for striking without his consent, (2) for an injunction against formation of a new local to take over Local 28's jurisdiction and (3) for damages for the local (but not the individual members) and counsel fees.

The gravamen of both complaints was that the revocation of the charter was illegal because: (1) the IP's consent to the strike was not required by the IBEW constitution and (2) even if it was so required, the revocation was invalid because (a) it was in breach of the fiduciary duty of the IP under §501(a) of Landrum-Griffin as well as the common law and IBEW constitution; (b) it was in bad faith in that the IP imposed punishment because he was angry at the Local's leaders for having successfully vindicated their rights against International in three federal suits within the previous 18 months; (c) the purpose of the revocation was illegal and contrary to public policy, namely, to force upon the Local a perpetual no-strike collective agreement not subject to termination or change in any respect without the consent of the employers or the unanimous approval of the Council on Industrial Relations of the Electrical Contracting Industry (CIR), a bipartite body consisting of an equal number of representatives of the IBEW and the National Electrical Contractors Assn. (NECA), of which the IP of the IBEW and the Chief Executive Officer of NECA were the co-chairmen; (d) the charter was revoked by a tribunal lacking jurisdiction; (e) the Local was denied a full and fair hearing; and (f) the revocation was an unreasonably severe sanction under the circumstances.

The Bases of District Court Jurisdiction

Jurisdiction in the Local 28 case was based on §301(a) of the LMRA, 29 U.S.C. §185(a) on the ground that the IP's action breached the IBEW Constitution, which is a "contract . . . between . . . labor organizations" within §301(a). The members' suit was brought under §§101, 102, 302, 304 and 609 of Landrum-Griffin 29 U.S.C. §§411, 412, 462, 464, 529 on the grounds that, (a) the revocation constituted "discipline" of the members which violated Landrum-Griffin and (b) the revocation and subsequent chartering of a subservient Local to take over the jurisdiction of Local 28 under handpicked leaders dominated by the International was a "trusteeship" within §3(h) of Landrum-Griffin subject to federal jurisdiction under §§302 and 304. The defendant contested plaintiffs' theories of jurisdiction, and raised affirmative jurisdictional defenses: (a) the Norris La-Guardia Act precludes an injunction in the local's case and (b) the doctrine of NLRB primary jurisdiction bars relief because part of the IP's conduct which allegedly violated the law and the IBEW constitution was also arguably an unfair labor practice.

The District Court Decision

The District Court held for plaintiffs on all jurisdictional questions except trusteeship, but refused to make any findings on certain questions of fact on the ground that they involved matters within the primary jurisdiction of the NLRB (App. 65, n. 58). On the merits, the court found the question of whether the IBEW constitution required the consent of the IP to the strike a "bona fide" "jury question" (Jt. App. 354, 372), which he resolved against the plaintiffs. However, the court held the revocation vitiated by the IP's bad faith and breach of fiduciary duty, by the unreasonable severity of the sanction under all the circumstances and by the failure to accord a full and fair hearing. As to bad faith, the court found that the IP acted

from "mixed motives", but there was enough bad faith to vitiate the revocation. The court ordered restoration of the charter of Local 28 and revocation of the charter which had been granted to the new Baltimore local (Local 24) in the face of plaintiffs' prior claim for injunction against such grant. The decree appointed a master to protect the rights of all IBEW members in the Baltimore area. Damages to the local and counsel fees were denied, and International was permitted to press charges previously filed against leaders of the local for causing the unauthorized strike.

The Court of Appeals Decision

Both parties appealed to the Fourth Circuit. The Court of Appeals unanimously sustained the District Court on all jurisdictional questions. By a 2-1 vote (Judge Soper dissenting) it reversed on the merits, holding that: (1) the IP's conduct, on the evidentiary facts as found by the District Court, did not violate his fiduciary duty, (2) although the local was the "bargaining representative for its members" (App. 6), it was entirely legal and proper for the IP to bring disciplinary proceedings to force the local to accept a contract which would perpetually take the effective bargaining power from the local and subject the local members to "high level bargaining" (App. 45) in the CIR, (3) the revocation was not an unreasonable sanction, (4) the local had the "full and fair hearing" required by §101(a)(5) of Landrum-Griffin, and (5) the IP's purpose to punish the Local for the federal suits filed in its prior disputes with International was not a sufficient reason under the circumstances to invalidate the revocation for bad faith. The majority, "not unmindful that the interests of the members of Local 28 in various local and international pension and benefit funds [the Local funds amounting to approximately ¾ million dollars] have been made uncertain by the revocation" (App. 77) remanded the cases for further orders.

Facts

Background — Previous Difficulties Between Local and International

In 1958, Local 28's new president, Eveson, asked International's support in his "effort to bring the financial affairs of the Local into line with the IBEW constitution" (Jt. App. 18). In February 1959, Freeman, the IP, responded by imposing a trusteeship under an International Representative, Goidel. Goidel sided with the faction whose prior control of the Local had been responsible for the concededly improper financial practices Eveson had sought to change (Jt. App. 693), and summarily removed Eveson from office for refusing to sign checks for "expenses" without evidence that the expenses were actually incurred. The trustee ruled "with an iron hand" (Jt. App. 18). Among other things, he suspended all by-laws and all membership meetings, and, through a sweetheart contract, he substantially "increased the ratio of apprentices to journeymen" (Jt. App. 18), which made supervision of apprentices less effective, and decreased journeymen's employment opportunities, as well as the total compensation for electrical construction work.

In November, 1959, the trustee, purportedly conforming to the Landrum-Griffin requirement of secret ballot for dues increases, submitted a concededly "drastic" (Jt. App. 862) proposal to the members by mail referendum ballot giving a choice of voting for either a substantial increase in dues, or for a lesser increase and a reduction of welfare benefits. There was no place on the ballot for a "no" vote (Jt. App. 730). Seven local members, the present leadership, after fruitlessly requesting relief from the trustee and the IP, sued to enjoin the referendum without further pursuing their internal union remedies.

The District Judge who held a hearing on that suit, as well as the District Judge in the instant case, agreed that

it would be unreasonable to have required any further delay for internal union remedies since either alternative under the referendum would have had immediate drastic effects and there was no opportunity to vote "No" (Jt. App. 281, 634). After the proceedings were brought (Jt. App. 264), the IP declared the referendum ineffective because most of the members had abstained from voting.

In March, 1960, the trustee, in response to a request for return of local autonomy and a new election of officers, filed charges before the International Executive Council (IEC) against the members who had brought the injunction suit (Jt. App. 18-19). The IP who admitted to a "very deep rooted feeling" against suits before exhausting union remedies (Jt. App. 260-1), and expressed himself publicly as "hating" the Landrum-Griffin Act because of its protection of access of union members to the courts (Jt. App. 26), personally authorized the charges and directed International's general counsel to assist in their preparation (Jt. App. 263-5). The charged members sued once more to enjoin the prosecution of the charges. The District Court in a preliminary hearing made clear that a conviction would not be sustained (Jt. App. 635), but withheld an injunction to permit the case to be heard by the IEC, which rejected the members' request to find them innocent, but closed the case out without imposing sanctions.

Also, in March, 1960, the Executive Board of Local 28 sued to set aside the trusteeship. In its sworn answers to interrogatories in that suit, International alleged as a reason for continuing the trusteeship the fact that members of the local had filed suits without pursuing their internal union procedures (Jt. App. 629-30). After a motion by International to dismiss this suit was overruled and the case was approaching trial, the IP in June, 1960, terminated the trusteeship. The present leadership of Local 28 was elected in August, 1960. International's first opportunity for reprisals came in 1961.

Issues Between Local and Maryland Chapter, NECA, to May 15, 1961

April 1, 1961, was the anniversary date of the local's collective agreement with the Maryland Chapter of NECA. The local gave notice it was terminating the contract; and the collective bargaining team designated by the members, opening negotiations for a new contract, requested a wage increase of 35¢ per hour.

The local's contract contained a "council clause" submitting disputes and proposed changes in the agreement, where the parties could not agree, to the CIR for binding decision.

The Maryland Chapter claimed that Local 28 was bound to submit the terms of any new contract between the parties to the CIR, on the ground it disputed the Local's right to terminate, and this "dispute" was covered by the "council clause" of the existing agreement.

The local thereupon, on March 28, 1961, filed proceedings in the U.S. District Court for Maryland for a declaratory judgment that it was entitled to terminate its contract with the Maryland Chapter, and was not bound to submit the terms of any new contract to the CIR. The local sent a copy of the suit papers to International, which did not respond in any way. However, the IBEW general counsel, with the approval of the IP, conferred about the case with counsel for NECA and the Maryland Chapter, without notifying the local, early in April. On April 21, 1961 (App. 686), while the suit was pending, the Maryland Chapter gave notice to the local that the Chapter was submitting to the CIR all disputes over the terms of the new contract and invited the local to appear. On April 25th, half the local's members walked off their jobs in anger at the Chapter's notice of submission to the CIR while the litigation was pending. On May 5, 1961, the Maryland Chapter

offered a wage increase of 5¢ an hour for 1961, 5¢ for 1962 and 10¢ for 1963.

On May 11, 1961, the District Court (Chief Judge Roszel C. Thomsen) construed the contract between the Local and the Maryland Chapter as terminable and held it was terminated by the local, effective March 31, 1961. The Court also stated by way of dictum that an agreement with a perpetual council clause which would not permit the local to terminate over objection of the Maryland Chapter without the consent of the CIR (which, under its rules, cannot change the status quo between the parties except by unanimous vote) would be illegal. (See *Local 28 v. Md. Chapter NECA*, 194 F. Supp. 494, D. Md. 1961). The court did not enjoin the Maryland Chapter's submission to the CIR, but made it clear that the CIR could not issue a binding decision if the local did not agree, and suggested that every local member go back to work during good faith collective bargaining (Jt. App. 21-2). The Chapter indicated it would appeal, and all the local members reported for work.

At the next bargaining session on May 13, 1961, the Maryland Chapter's negotiators congratulated the local's negotiating team and discussed a wage increase of 50¢ over three years, "an amount substantially higher than the last offer" (App. 20). The local, as the District Court specifically found, reasonably believed that it had the support of the International in its efforts to obtain a substantial increase (although an International Representative had told the local that 35¢ was "shooting for the moon") (Jt. App. 20), and reported to the IP on May 14 that management was coming up with "far more substantial offers" (App. 20).

The CIR "Decision" of May 15, 1961

On May 15, 1961, the submission of the Maryland Chapter to the CIR came on for hearing. The members of the local

were at work. The local did not appear, and sent a letter explaining its reasons. The District Court found that the International President, who presided at the hearing, was "very angry" (Jt. App. 23). Following the presentation of the Maryland Chapter, as the District Court found despite elaborate attempts (including Freeman's own false testimony (Jt. App. 217-19)) to deny, conceal and falsify the facts (Jt. App. 23), the CIR, with the assent of the IP, reached a "tentative decision" (no decision is formally announced until after the completion of a session which lasts several days) on an increase of 10¢ per hour for the next year, which, as the District Court found, "tipped the hand" of the IP to the management representatives on the CIR as to the limit of the wage he would support for the local (Jt. App. 380; for text of the "decision" see Jt. App. 705).

This decision was actually a "sellout" of the local. As International's leading counsel conceded, "if he had bargained this out at 10¢ all I say about it was that he wasn't doing a very good job for labor" (Jt. App. 381).* The District Court found that "the Local was afraid to submit its dispute to the Council . . . and the evidence in the instant cases shows that this fear was justified by the attitude of Freeman and other members of the Council of May 15 and throughout these cases" (Jt. App. 40, n. 44), and that because of this attitude, "it would not be reasonable" to require the Local to submit to CIR decision (Jt. App. 40).

The Local was not informed of this decision of the Council and did not discover it until about three weeks after the

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* Despite International's effort to show that Baltimore was less unionized than other nearby cities, the Maryland Chapter represented "80% of the major construction in and around Baltimore" (App. 6, n. 3), which Professor Dunlop, International's expert, testified is the "key sector" in which the "degree of organization" is material to the "kinds of wages we are talking about", i.e., "in the commercial industrial sector rather than in home building or heavy and highway construction" (Jt. App. 509).

trial began — International did not reveal it in its pre-trial answers to the Local's interrogatories.

The Strike

On May 18, 1961, three days after the CIR "decision", the Maryland Chapter offered the local a 10¢ increase for 1961, 10¢ for 1962, and 5¢ for 1963. On May 19, 1961, the Chapter noted an appeal from the decision in the declaratory judgment proceedings. On May 20, the Md. Chapter's submission to the CIR was referred to the CIR Executive Committee, consisting of Freeman, Geary and two other members to "review, revise or take such other action as may be deemed necessary with the language and the effective date of the Council's decision reached in the Baltimore case, prior to its being released" (Jt. App. 23). On May 24th, NECA's counsel, on Geary's instruction, wrote to counsel for the Md. Chapter that there had been a CIR decision and asked assistance as to the wording thereof, although the District Court found that the counsel for the Md. Chapter was not informed of the amount of the wage that had been decided upon (DX 51, Jt. App. 818-19, 423, 452).

Between May 15 and June 2, the Local was bargaining with the Md. Chapter, which, so far as the Local knew, was its only adversary. During that time, however, without the Local's knowledge, as both courts found, "Freeman assured Geary that if the appeal [of the Md. Chapter in the declaratory judgment case] was dismissed, Freeman would do everything he could to see that the Local submit to the Council all issues regarding the terms and provisions of a new contract which could not be resolved by bargaining between the Local and the Maryland Chapter" (Jt. App. 24). On June 2, 1961, at a meeting in the office of International's general counsel, at which representatives of

NECA and the Md. Chapter participated, and of which the Local was likewise not informed, it was decided to dismiss the appeal "because the attorneys were agreed that there was a small chance of success and feared that a decision on appeal might be rested on broader grounds, evidently that any 'evergreen clause' . . . would be illegal" (Jt. App. 24).

On the same day, with knowledge of this determination to end the litigation (Jt. App. 441) the Executive Committee issued a "decision" that "in view of the pending litigation, no decision would be issued in the Local 28 case" (Jt. App. 653-4).

Geary promptly sent a representative to the Md. Chapter to advise it with respect to its negotiations with the Local and "particularly" to ask that the new contract contain the so called "yellow sheet clause", (Jt. App. 610-11) making it crystal clear that neither party could ever terminate or change the agreement without the consent of the other party or the unanimous approval of the CIR. At the next bargaining session, on June 5, 1961, the Chapter's offer for a new one-year contract was a wage increase of 10¢ an hour and the "yellow sheet" council clause (App. 21).

The appeal in the declaratory judgment case was formally dismissed June 9. On June 13, the local, making no progress in negotiations and angered by the demand for the perpetual council clause after having won the declaratory judgment case, voted to strike and notified the IP, from whom it had had absolutely no previous disapproval of its conduct during negotiations, stating, "any instructions from you will be appreciated". The IP, who authorized the 1962 New York strike for a 20-hour week, flatly refused consent, testifying to a variety of reasons which the District Court found were later and insubstantial rationalizations (Jt. App. 25, n. 24-27).

The strike began on June 19, and the Local's representatives obtained an audience with the IP on June 20, at which the local advised the IP that it had succeeded in signing up a dozen contractors, at least one of which was a NECA member, at the 35¢ figure; that the local's leaders felt they would win the strike momentarily; that the Md. Chapter had demanded the "yellow sheet" council clause; and that the local was bringing charges against the Md. Chapter before the NLRB for refusing to bargain in good faith by insisting on this clause. They asked essentially, as they put it in a telegram a day or two later, "to give us time, your cooperation, and let things run their course in Baltimore" (Jt. App. 27, n. 29).

International had generally done just this in the past. During Freeman's tenure, since 1955, there have been approximately 15 to 20 strikes in the so called "strikeless" electrical construction industry (Jt. App. 232), in which no prior permission was asked, and no disciplinary action was taken. Up to the present case, the unvarying practice of the International was to refer the matter to a Vice-President for investigation and recommendation (Jt. App. 563), which was invariably followed (Jt. App. 564). A favorable recommendation was always given if the strike did not violate federal or state law, or existing agreements (Jt. App. 563). The same procedure has been consistently followed even where the local has gone off the job before notifying the International or asking for consent (Jt. App. 564-565). In fact, at the very time of Local 28's strike, Local 159, in Madison, Wisconsin, had struck without the IP's consent, on June 1, 1961, because of an impasse created by the NECA Chapter's insistence on a "yellow sheet" council clause in the new contract. Freeman was informed of the issues by the contractors and, following the established procedure, referred the matter to the appropriate Vice

President. The Local was out on strike four full weeks, until June 27, 1961, when NECA gave up the demand for the perpetual council clause. The IP never did consent, but no disciplinary action was ever taken (Jt. App. 124; 232-235; 565-571; 656-657).

The IP, as both courts found, told the local that he wished them well in their negotiations, but that any unresolved issues would have to be finally decided by the Council (App. 23, Jt. App. 26). At approximately the same time, without informing the local, Freeman gave Geary his assurance that he would do what he could to obtain other union employees for the Maryland contractors (App. 24-5). The local refused to abandon the strike, and Geary advised the Md. Chapter not to bargain with the local while the local was on strike (Jt. App. 318-320); the Md. Chapter formally broke off the bargaining on July 6, 1961 (App. 24).

The Revocation Proceedings

On July 7, 1961, the IP formally charged the local with engaging in a strike without his consent, in violation of the IBEW constitution. He did not prefer charges before the IEC as permitted by Article IX, §4, of the union constitution, and he admitted that why he did not do so was "a rather difficult question to answer" (Jt. App. 35). He appointed a referee to take testimony, but reserved to himself all questions of law as well as the ultimate decision.

Before the hearing, the local's representatives again met with him on July 12, and, as he admitted, offered to settle the matter by ending the strike and submitting to independent arbitration all unresolved issues as to the terms of the new contract. The IP refused, insisting that the only way that the local could avoid disciplinary action was to submit all outstanding issues to the CIR. The local's representatives reiterated their fear of the perpetual council

clause, and the IP refused to give them any assurance that the clause would not be imposed by the Council, because "I couldn't speak for the Council" (Jt. App. 247) — although he had a veto and could have prevented the imposition of such a clause. The IP did not tell the local representatives, and it was not discovered until well after suit was brought, that the CIR by secret resolution, not revealed to all the officers and International Representatives of the IBEW, much less any of the locals, had (because of revision of local agreements in the late 1930's and early 1940's as Freeman testified — evidently in compliance with §8(d) of the NLRA — so as to provide expressly for the right to terminate (Jt. App. 239-41)), passed a formal resolution shortly after Freeman's accession to office establishing a policy that the CIR would impose the "yellow sheet" council clause whenever a case was submitted to it in which termination or the form of a council clause was an issue. The published policy of the CIR as stated in its own handbook (Jt. App. 640-41), and in the grant of jurisdiction by the sponsoring organizations (Jt. App. 869-77), emphasizes that the CIR is a *voluntary* judicial-type tribunal which has no power to act except to the extent granted by voluntary *ad hoc* submission or by general contract between an IBEW local and a NECA Chapter.

Testimony was taken before the referee. The Local called upon the IP to be a witness, among other things, concerning his real reasons for charging the Local, and "the propriety of his own actions and his own good faith and motives" (Jt. App. 35). The IP refused to testify because "in the final analysis, I would have to make a decision in the case" (Jt. App. 35). As the District Court found, "the general counsel for the IBEW drew the charges, presented evidence in support of the charges, cross-examined the Local's witnesses, argued the case and also consulted with and advised the IP with regard to the subject matter of the proceedings

and the provisions of his order, out of the presence of counsel for the Local" (Jt. App. 36).

On August 1, 1961, the IP issued an order revoking the local's charter, unless the local returned to work and directed its collective bargaining team to refer to the CIR, for final and binding decision, all collective bargaining issues currently in dispute with the Maryland Chapter, "it being understood that the Local should not be required to accept the council clause ruled terminable by Chief Judge Thomsen" (Jt. App. 28). The District Court found that "the quoted language was carefully chosen to avoid any commitment by the IP that the Local would not be required to accept a more stringent form of council clause" (Jt. App. 28). The IP testified that the submission of the bargaining to the CIR in lieu of striking was what he "really wanted from the Local Union" and the ultimate objective for which he was "prepared to enforce disciplinary action" (Jt. App. 249).

The Local, as the District Court found, justifiably fearing the CIR, refused to submit to that body and the revocation became effective August 7, 1961. The tremendous severity of the penalty in terms of the pension, sickness, hospitalization, disability and other benefits, as well as the employment, of the approximately 1400 members of the Local, is documented in the opinion of the District Court (Jt. App. 41). The Local appealed to the International Executive Council (IEC), a majority of whose members were appointees of the IP. The attempt of the Local to disqualify such appointees was disallowed and the IEC affirmed the IP. The District Court found, and the Court of Appeals did not disturb the finding, that the hearing before the IEC was an "appellate" proceeding and not in the nature of a trial de novo, and therefore could not cure any unfairness in the hearing before the IP.

Local 24

In July, 1961, before the completion of the revocation proceedings, the IP authorized laying the groundwork for a new Local, No. 24 (Jt. App. 30), whose purpose, as the IP testified, was to take over the rank and file of Local 28 (Jt. App. 273). Local 24 was officially chartered shortly after Local 28's charter was revoked. The District Court found "this new Local . . . is and from its inception has been dominated by Representatives of the International" (Jt. App. 30), and was formed as "part of a plan" to substitute "a subservient local" for Local 28 (Jt. App. 45).

Two leading contractors of the Md. Chapter cooperated with the IBEW in organizing Local 24, and their Vice Presidents had resigned their offices (although neither they nor the other top permanent supervisory and management personnel who were charter members of 24 ever changed their duties) in order to participate in the organization of the new union. The charter group numbered approximately 30 of these "carefully chosen leaders" (Jt. App. 30). This group adopted new by-laws written by specially assigned International Representatives (Jt. App. 288), which, as distinguished from Local 28, provided no welfare funds at all and complete control by the president over the designation of the collective bargaining team.

While the majority opinion of the Court of Appeals points out that "when permanent officers were elected . . . several hundred men had joined Local 24" (App. 29), International's answer to Local 28's complaint admits (Jt. App. 117), and the District Court found (Jt. App. 30), that nominations for permanent officers were made and closed when the membership was still limited to the charter group of approximately 30. The faction of Local 28 favored by the International and forced out of office by the members, are the present leaders of Local 24.

It took exactly two brief meetings, on September 19 and 21, 1961 (Jt. App. 663-64) to negotiate a new contract between Local 24 and the Maryland Chapter, as compared to the innumerable protracted negotiations extending over six months between Local 28 and the Md. Chapter, during which no agreement could be reached. The negotiations on behalf of 24 were conducted by Alfred Terry, the International Representative assigned to supervise the Local (Jt. App. 388), and on behalf of the Md. Chapter by S. J. Cristiano, Eastern Regional Director of NECA (Jt. App. 140) working under Geary.

The contract provided for a "25¢ wage increase for each of two years" (App. 29). The IP did not insist on a perpetual council clause in this contract. Upon the signing of the contract, the international representatives conducted an organizing campaign, which included taking contractors away from Local 28 (Jt. App. 299-301), having Local 28's members fired from their employment and boasting of these exploits in anonymous weekly letters (Jt. App. 668-69) sent to every member of Local 28 by addressograph plates furnished for the purpose by the International.

REASONS FOR GRANTING THE WRIT

This case raises questions of construction of federal labor statutes which are of the highest importance and urgently require settlement by this Court. As in the past generation, the protection of labor unions and employers in their relationship to each other were the chief problems of labor law, so currently the chief problem in this field is the protection of the individual union member in his relationship to his union. Concern over this problem has culminated in the Landrum-Griffin Act of 1959. The instant case is the first opportunity of this Court to clarify the following fundamental questions as to both substantive rights and the scope of federal jurisdiction under this act and related labor statutes, which immediately and vitally affect not only the

1400 members of Local 28, IBEW, and the 150,000 IBEW members in the electrical construction industry, but also the millions of rank and file members of all American labor unions.

1. *The nature of the fiduciary obligation of International union officers to local unions and their members.*

This case raises fundamental questions as to the scope and content of the fiduciary obligation of union officers enacted into Federal law by section 501(a) of the Landrum-Griffin Act.

Section 2 of Landrum-Griffin (29 U.S.C. §401) declares Congress's finding that although "it is essential that labor organizations . ... and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations . . . there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees . . ."

Section 501 of Landrum-Griffin (29 U.S.C. §501) is the chief operative provision reflecting this basic Congressional concern. This section provides that "the officers . . . of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization . . . to refrain from dealing with such organization as an adverse party or on behalf of an adverse party in any matter connected with his duties . . ." Any union constitutional provision purporting to exculpate union officials from liability for violation of §501 is declared void as against public policy.

Professor (now Solicitor General) Cox has described this section as "potentially the most important" in the entire Act. Cox, Law and the National Labor Policy (1960) 92. The District Court concluded, and the majority of the Court of Appeals did not deny that the "broad declaration" of the fiduciary duty in section 501(a) is not limited to "pecuniary matters" (Jt. App. 13). The legislative history, exhaustively analyzed in *Nelson v. Johnson*, 52 LRRM 2047 (D.C. Minn. 1962) makes clear that the District Court's conclusion was correct and that the duty extends particularly to the collective bargaining context. Section 501 was the congressional response to the findings of the McClellan committee with regard to sweetheart contracts, discrimination against political opposition, "sellout" of locals by international officials, and other abuses of official power, both large and small. The section "is no parsimonious dole by the Congress", but was intended to remedy all the mischief which called it forth, whether or not within the literal language of union constitutional provisions. *Nelson v. Johnson*, supra, 52 LRRM at 2094.

The majority concluded, despite the express finding of the District Court to the contrary (Jt. App. 39, 40-1), that the IP's conduct in this case was not a breach of his abiding statutory fiduciary obligation. In this, the majority decision is permeated with a spirit so insensitive to the purpose and declared policies of the Landrum-Griffin Act, that there is a grave danger to the rights of millions of rank and file union members. If that decision is allowed to stand, suits to vindicate the rank and file will be so discouraged that this Court may not soon get another opportunity for correction.

The decision below also sharply conflicts in principle with two District Court cases in other circuits, which approve and follow the District Court opinion in the instant case. *Nelson v. Johnson*, 52 LRRM 2047 (D.C. Minn. 1962)

(extensively discussing the District Court opinion in the instant case at pp. 2077-83); *Calabrese v. United Association*, 52 LRRM 2022 (D. N.J. 1962). Unless this Court makes clear as promptly as possible that the Landrum-Griffin Act is to be sympathetically construed and liberally applied by the courts, the judicial remedies that Congress meant to open against union officials serving their flock with less than undivided loyalty will be only a promise broken to the hope.

"The principles stated in §501(a) were drawn from the *Restatement of Agency* in an effort to incorporate the whole body of common law precedents defining the fiduciary obligations of agents and trustees with such adaptations as might be required to take into account the special problems and functions of a labor organization". Cox, *Internal Affairs of Labor Unions Under The Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 828 (1960). The common law fiduciary obligation requires more than even good faith. *Nelson v. Johnson*, 52 LRRM 2047 (D.C. Minn. 1962) (Directive of International General Executive Board overriding decision of Local, even if in good faith and within constitutional powers of the General Executive Board, violated fiduciary obligation under the circumstances of that case).

One of the most fundamental duties of a fiduciary is the "duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person in respect to his interest". Restatement of Trusts, 2d Ed. §§173, Comment *d*, 201; Restatement of Agency, 2d Ed. §387, Comment *b*; 36A C.J.S., Fiduciary, §§381-89. In this case, Freeman did not tell the local that he had blunted in advance the force of their bargaining position by his deal with NECA in the Council to limit to 10¢ per hour the

increase for the next year and by his assurance to Geary before the strike that he would do all he could to make the local submit all unresolved collective bargaining issues to the Council, where the wages were already "cut and dried" and where the local would be subjected to the perpetual council clause.

The majority opinion does not discuss this obligation except for a passing reference in the statement of facts, pointing out that the District Court found as a fact that the Local failed to prove that news of the deal was communicated to the Md. Chapter (App. 21). However, the District Court also found that International failed to prove the contrary (Jt. App. 23) and this state of the record properly did not prevent the District Court from finding, as it did, that the revocation was a breach of the IP's common law and statutory fiduciary obligations. First, it is immaterial whether the Md. Chapter was ever told in so many words that the decision reached on May 15 would limit the increase to only ten cents; the breach was complete when the IP made his commitments to NECA, particularly to NECA's chief executive, Geary, who thereafter, as found by both courts, closely advised the Md. Chapter in its dealings with Local 28 with knowledge of what had been revealed to him, but not to the local. Second, the course of conduct of the Md. Chapter, as found by the District Court, and the majority of the Court of Appeals, is consistent with knowledge of the decision to the point of remarkable "coincidence" (Jt. App. 23) if the decision was not expressly communicated; and the burden is not on the local to prove express communication, but on the fiduciary to prove that no harm came from the breach. See Restatement of Trusts, 2d Ed. §172, comment *b*; cf. 1 Story, Equity Jurisprudence, 13th Ed. (1886), 333 n; Restatement of Agency, 2d Ed. §389, Comments *b*, *c*, and *e*.

Finally, the breach of fiduciary obligation is broader than even the tipping of the IP's hand in regard to wages.

The following additional facts established that Freeman did not have the required loyalty to his beneficiaries: his extreme anger at the present leadership of the local because they had exercised their right to bring suits against the International under §101(a)(4) of Landrum-Griffin; the unreasonably low wage increase beyond which Freeman would not support the local, which is explicable only by a desire to punish the local's members; Freeman's failure to communicate to the local, during its negotiations with the Md. Chapter, his other commitments to Geary that he would not consent to any strike and would assist in breaking any strike undertaken without his consent; his misleading the Local by dealing with it, in the words of §501(a), "as an adverse party or on behalf of an adverse party", in that he led the Local to believe that its only adversary was the Md. Chapter of NECA, or, as Judge Soper put it, "he promised the Local his support, but in fact worked in harmony with NECA" (App. 79); his admitted refusal to accept the Local's offer on July 12, 1961 to return to work and submit to independent arbitration, which the majority of the Court of Appeals apparently overlooked when they stated that the revocation "would seem to have been the only effective means to restore industrial peace" (App. 36, n. 23); his insistence that only by submission to the CIR, where he could be sure to give effect to his "sellout" could the Local avoid disciplinary action; the difference between his treatment of this strike and numerous other unauthorized strikes, particularly the contemporaneous strike over the same issue in Madison, Wis., where he did give the Local time, and did not, behind the Local's back, make a deal with the employers which made free collective bargaining impossible; his conduct in respect to the hearing, where he was both prosecutor and judge and refused to testify when the propriety of his own conduct was called into question and his testi-

mony was vital to the Local's defense; the severity of the sanction imposed, affecting the employment, pension and other membership rights of 1400 IBEW members in the Baltimore area; and his being, as the District Court put it, "in league with the wolves" rather than a "good shepherd", in the establishment of Local 24 (Jt. App. 593).

As to these considerations, the majority opinion is simply silent. The opinion rests almost entirely on the abstract proposition that an IP may legitimately feel that the best interests of his union as a whole require that he not support the immediate objective of one of his locals. As an abstract proposition, this may be entirely correct, but this case goes far beyond a legitimate and open disagreement as to policy. As Judge Soper points out in his dissent the "majority opinion embraces the theory that 'basic union policy and structure' require that the dominant power be lodged in the parent body and pursues this theme so steadily in the course of an elaborate discussion that in the end little heed is given to the arbitrary manner in which the IP exercised his power" (App. 78).

Actually, the greater the concentration of power, so relied upon by the majority opinion, the greater the necessity for the most careful scrutiny of the exercise of such power to insure compliance with fiduciary standards. The question is not one of the extent of power, but of its forfeiture by abuse under particular circumstances. In approaching this question, the majority of the Court of Appeals fails to give weight to the "emphatic" mood of Congress in the enactment of the fiduciary obligation. See *Nelson v. Johnson*, 52 LRRM 2047, 2089 (D.C. Minn. 1962).

The rights of rank and file members intended to be secured by Congress are so vitally important that it is proper to take alarm at the first indication that they are infringed, and no erosive construction or application of the statutory duty should be tolerated by this Court. It was the IP's own breach of fiduciary obligation that gave rise to any

condition in which he might have felt it "necessary" to discipline the Local, and his real objective at all times was to force the Local to the CIR, which was the instrument by which his breach of fiduciary obligation was to be consummated. For the Local to have yielded would have been to place the breach beyond all remedy.

2. *The legality of the IP's attempt to destroy permanently all local autonomy in collective bargaining by forcing a perpetual "council clause" upon the local.*

The majority of the Court of Appeals held the IP legally justified in using his constitutional power to discipline a local for the purpose of forcing it to submit to a perpetual contract whereby wages, hours and other conditions of employment would be, practically speaking, forever fixed, without the possibility of a strike except in breach of express contract terms, unless the Md. Chapter of NECA, or the CIR by unanimous vote, agreed to a change. Such a contract, by taking away the local's right to insist upon a change in the dispute-settling machinery, in effect takes away the local's right to bargain. The majority opinion describes this issue as one of "basic union policy and structure". Actually, the decision opens the door to the restoration of the tyranny and autocratic rule, which it was the express purpose of Landrum-Griffin to destroy. See *Nelson v. Johnson*, 52 LRRM 2047, 2059-63 (D.C. Minn. 1962); Summers, The Impact of Landrum-Griffin Upon State Courts, 13 N.Y.U. Ann. Conf. on Labor, 333, 335; Note, Rights of Union Members: The Developing Law Under the LMRDA, 48 Va. L. Rev. 78, 81 (1962).

Section 2 of Landrum-Griffin affirms that it is the responsibility of the federal government to "protect *employees'* rights to . . . . choose their own representatives" and "bargain collectively". The right to designate bargaining representatives is a right of the employees in the

bargaining unit. The IP cannot use his disciplinary powers to compel those employees to submit to "higher collective bargaining" by representatives they have not chosen, or impose sanctions upon such employees because of their exercise of the rights guaranteed by law. Cf. *Allen Bradley Co. v. N.L.R.B.*, 286 F. 2d 442 (C.A. 7, 1961).

If local members are forever tied to the will of the IP as to the substantive terms of their bargaining contract, what is the point of the democratic formulation of local policy? Why should an IP be worried about imposing formal trusteeships or about other restraints in the Landrum-Griffin Act if he can accomplish suspension of local autonomy by making the local membership forever dependent upon his good grace with regard to their wages and hours? In this broader aspect the decision below endangers the livelihood of every union member and provides a tremendous weapon in the hands of the Becks, the Crosses and the Hoffas, imperiling the whole concept of union democracy at the root of Landrum-Griffin's design to guard "local autonomy". Summers, The Impact of Landrum-Griffin on State Courts, 13 N.Y.U. Ann. Conf. on Labor, 333, 334 (1960).

The majority refused to find any fault with the IP's purpose, apparently holding itself powerless to consider this question of labor "policy" in the absence, as it conceived, of express statutory provisions. It is clear, however, that the District Court was correct in concluding that the national labor policy forbids the use of disciplinary powers (including forfeiture of pension and other welfare benefits) to compel the acceptance of a perpetual council clause. cf. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1956); *Nelson v. Johnson*, 52 LRRM 2068-69); Summers, The Impact of Landrum-Griffin on State Courts, 13 N.Y.U. Ann. Conf. on Labor, 333, 336 (1960); *Young v. Hayes*, 195 F. Supp. 911 (D.D.C. 1961). Perpetual or evergreen labor

agreements are contrary to the policy of the NLRA and Landrum-Griffin against unduly rigid restraints on the right of employees to select their bargaining representatives. See Chief Judge Thomsen's decision in *Local 28 v. Md. Chapter, NECA*, 194 F. Supp. 494, (D. Md. 1961) and the cases cited in majority opinion at App. 43-45. The same policy forbids an attempt by the IP to discipline a local in order to force essentially the same result, i.e., a perpetual usurpation of the Local's role in collective bargaining.

The majority opinion argues that "at most, the International can be said to have attempted to *compel* one of its component bodies" to "*voluntarily* forbear" any claim in the future to the right to strike or to attempt to change wages, etc. without consent of the Md. Chapter or every member of the CIR (App. 45, emphasis supplied). If this remarkable concept of compelled voluntarism can save the IP's purpose from illegality, then collective bargaining has brought workers not freedom but an additional tyrant. See remarks of Senator McClellan, 105 Congressional Record 5086 (1959); Summers, Union Powers and Workers Rights, 49 Mich. L. Rev. 805, 820 (1951). Cf. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 at 250, 62 L. Ed. 260 at 276 (1917).

At the very least, in its narrowest aspect, this case provides an important opportunity for this Court to make clear that union constitutions will not be interpreted to give to the IP the power sanctioned by the majority below, where, as here, the language claimed to relinquish the fundamental rights of local members is not express and clear. Cf. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 729, 744-45, 89 L. Ed. 1886, 1897, 1906 (1945). In the instant case, the IP recognized on the witness stand that the IBEW constitution recognizes the right of locals to bargain their own wages and hours (Jt. App. 65, Art. XV §5; Jt. App.

164, 167-71, 749), a right Professor Dunlop, International's own expert, testified necessarily involves the right to bargain duration of the contract (Jt. App. 523).

Contracts negotiated by a local are subject to approval by the IP, and the IP is authorized to enter into certain national agreements covering the entire jurisdiction of the IBEW, but these powers should be harmonized with the locals' powers to negotiate wages, etc. (Jt. App. 164, 174). Freeman admitted on the witness stand that the IBEW constitution provides for a degree of local autonomy he has no right to destroy (Jt. App. 171-2). The constitution does not contemplate complete authoritarian power in the IP but a balance between local autonomy and international power. The decision below permits the IP to destroy the balance and permanently wipe out all local autonomy with respect to collective bargaining.

3. *The Meaning of a "Full and Fair Hearing" Within §101(a)(5) of Landrum-Griffin.*

The Landrum-Griffin Act (§101(a)(5), 29 U.S.C. §411 (a)(5)) established for the first time a federal requirement of a full and fair hearing as a condition of the discipline of union members. Section 101(b), 29 U.S.C. §411(b), provides that "any provision of the constitution and by laws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect".

The abuse of disciplinary powers was one of the major concerns of Congress in enacting the statute. It is of fundamental importance that it be made perfectly clear to union officers, who seem to be imbued with the spirit of union constitutions providing for autocratic disciplinary procedures and automatic expulsion for failure to exhaust internal remedies, that the requirements of a full and fair hearing will be scrupulously insisted upon by the federal courts. The instant case provides an important opportunity for this Court to lay down the requirements of a

full and fair hearing in union disciplinary cases as a matter of federal law, and the approach to be taken to the interpretation of international constitutions, in light of §101(b) above quoted, with regard to the jurisdiction of a union officer to act as judge where he is also the charging party and prosecutor.

The majority of the Court of Appeals, reversing the District Court's express finding, concluded that the local had had a full and fair hearing, notwithstanding that the IP was both prosecutor and judge; that he refused to appear as a witness although his testimony was vital to the defense; and that the general counsel of the International helped him draft the charges, prosecuted the case and advised him out of the presence of counsel for the local, with regard to the subject matter of the proceedings and the provisions of his order. The IP's role as prosecutor and judge was approved in the prevailing opinion below on the ground that as prosecutor, he was acting "officially" and not personally (App. 51). However, as the District Court concluded, and as Judge Soper pointed out, he was so personally involved that he simply could not be a fair judge either as to guilt or penalty, because at the very least "he knew that he had opposed the working employees and favored NECA" and "his own conduct was one of the matters that should be taken into consideration in deciding the case" (App. 80-81).

The majority opinion recognizes that the right to a fair hearing includes the right to confront and cross-examine witnesses, but is entirely silent as to the failure of the IP to submit himself as a witness to the local, whose defense was based on calling into question the propriety of his conduct. There simply could not be a "full" hearing, let alone a fair one, without the IP's testimony.

Many union constitutions provide for trial either by the IP or the International Executive body. This Court should

make clear that the grant of jurisdiction by the union constitution must be construed as conditioned upon the lack of such personal involvement by the tribunal as would prevent a full and fair hearing. Any provision similar to the provision in the IBEW constitution, giving the IP jurisdiction to try a Local, should be held to be qualified by §§101(b) and 501 of Landrum-Griffin so as to deny jurisdiction where the IP is personally involved to the extent shown in this record. Even at common law, the courts have consistently so qualified union constitutional provisions, and, where qualification is impossible as a matter of construction, have declared them void as against public policy. (Summers, The Law of Union Discipline: What the Courts Do In Fact, 70 Yale L.J. 175, 180-84 (1960); The Impact of Landrum-Griffin on State Courts, 13 N.Y.U. Ann. Conf. on Labor, 333, 349-50 (1960)).

4. *The Scope of the Trusteeship Provisions of Landrum-Griffin.*

A major part of the legislative history of Landrum-Griffin was concerned with the destruction of local autonomy by international officers, particularly by means of "trusteeships". This concern resulted in an express grant of federal jurisdiction over "trusteeships" at the suit of any member or subordinate body of a labor organization. Congress defined "trusteeship" more broadly than the traditional trusteeship over local unions. Section 3(h) (29 U.S.C. §402(h)) defines "trusteeship" as "any receivership, trusteeship or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws". This case raises the vital question of whether the statutory "trusteeship" provision may be rendered nugatory by permitting an International union, without accountability in a federal court, to revoke a local charter and to recharter a new and subservient local for the same jurisdiction, in which the prior democratically elected

leadership is ousted in favor of leadership handpicked, and as the District Court found, completely dominated by International.

It is unnecessary to belabor the vast importance of this question. As one commentator put it, "If the illegitimate purposes of trusteeship can be accomplished by other means, how effective are the trusteeships provisions of LMRDA?" Horowitz, Possible Effects of LMRDA's Trusteeship Provisions, in Slovenko Ed., Symposium on LMRDA of 1959 (1961), 458, 463. The District Court found that there was no trusteeship in the instant case because it found no specific attempt to evade the trusteeship provisions of the statute. The Court of Appeals rejected the argument that the facts with regard to the new local set forth at p. 20 of this Petition, constituted a trusteeship within the statutory definition, although it found the question "exceedingly close" (App. 73). On the other hand in Anderson, Landrum-Griffin and the Trusteeship Imbroglio, 71 Yale L.J. 1460, 1478-1485 (1962), in a careful and reasoned discussion of the instant case, the conclusion is reached that the action of the International in this case was such a method of supervision and control suspending the autonomy otherwise available to the Baltimore Local of the IBEW that federal jurisdiction probably exists under the trusteeship section of Landrum-Griffin. It is submitted that the latter conclusion is correct and that the sweep of the Landrum-Griffin trusteeship provisions, going as they do to the root of the problem of union democracy which was central to the act, should be promptly settled by this Court.

5. *The Policy of the Courts as to Counsel Fees in Landrum-Griffin Actions.*

The District Court, although it set aside the disciplinary action challenged in this case, denied damages to the local (which were stipulated to amount to $50,662.64) (Jt. App.

714), and also denied counsel fees. The Court of Appeals of course did not reach these questions. If, as is submitted, the revocation is invalid, this case will also raise questions in this Court as to whether or not counsel fees should be awarded to petitioners under Landrum-Griffin.

This is an important opportunity to make clear that trial courts should be liberal to successful plaintiffs in Landrum-Griffin actions in order to fulfill the congressional objective of encouraging suits to remedy wrongful conduct by union officials. The policy of courts on counsel fees can vitally affect the extent to which the paper guarantees of Landrum-Griffin will be translated into meaningful protection in the courts. This Court should make clear beyond doubt that counsel fees should be awarded as a matter of course where plaintiffs have successfully challenged illegal conduct of union officials in suits under Landrum-Griffin. See *Nelson v. Johnson*, 52 LRRM 2047, 2095-97 (DC Minn. 1962).

As Professor Cox has pointed out, "the effectiveness of the LMRDA will depend largely on the initiative and energy of union members". Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960). There are vast obstacles, including time, money and fear of reprisals, involved in such an undertaking. Cox, Law and the National Labor Policy (1960) 105-6. The courts should do everything in their power to encourage the bringing of well founded suits under the statute.

6. *Other Important Jurisdictional Questions Besides Trusteeship.*

Most of the problems in this case as to federal jurisdiction and the power of the federal courts under the national labor statutes were decided in favor of the petitioners. However, the Court of Appeals found them "serious" (App.

3) and there is conflict among the lower federal courts as to some of them. Upon grant of certiorari they will, no doubt, be presented for decision. The questions numbered 5 and 8-11, on pages 4-5, *supra*, which relate to the extent of federal judicial power over union discipline should be promptly clarified. This case also provides a particularly important opportunity to clarify and rationalize the relationship of NLRB jurisdiction to that of the courts in cases for breach of a union constitution, where part of the total conduct of the international officers in breach of the constitution may arguably also be an unfair labor practice, but the NLRB does not have jurisdiction over all of the questions in the case, which are inextricably intertwined, nor the power to give complete relief, and the courts likewise cannot do complete justice if the case is fragmented between two tribunals. See Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963).

CONCLUSION

Rarely does a case raise issues of such signal importance in a vital area of public law as does the case at bar. See *Business Week*, Feb. 16, 1963, p. 55. The petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8649

John E. Parks, Jr., and Robert M. Foote and Albert McHugh and Paul Ziegler and Silvio Stamerro, Individually and as Representatives of the members of Local 28, I.B.E.W., in a Class Action, and Local Union 28, International Brotherhood of Electrical Workers,

Appellees and Cross-Appellants;

versus

International Brotherhood of Electrical Workers,
Appellant and Cross-Appellee.
Local Union No. 24 (4BEW),
Intervenor.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued June 14, 1962. Decided January 23, 1963.)

Before SOBELOFF, Chief Judge, and SOPER and J. SPENCER BELL, Circuit Judges.

John Henry Lewin and Thomas X. Dunn (Robert R. Bair, and Venable, Baetjer & Howard on brief) for Appellant and Cross-Appellee; George Cochran Doub (Weinberg and Green on brief) for Intervenor-Appellant; Melvin J. Sykes (Patrick A. O'Doherty on brief) for Appellees and Cross-Appellants; and J. Albert Woll and Theodore J. St. Antoine on brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae.

SOBELOFF, Chief Judge:

A dispute between an international union and one of its component local unions which led to the revocation of the local's charter and the establishment of a new local embracing its jurisdiction, occasioned two suits against the international. One was brought by the local union and the other by five of its members in behalf of the membership, both suits seeking declaratory judgments and injunctive relief to restore the local to good standing in the international and to obtain incidental relief. The two suits have been consolidated. The revocation action complained of was taken by the International Brotherhood of Electrical workers (IBEW) after its Local Union No. 28-IBEW (Local 28) went out on strike without obtaining the approval of the IBEW International President (IP) in contravention of the IBEW Constitution and failed to return to work in defiance of his repeated directions to do so. The strike was undertaken by the Local to enforce demands made by it in the course of contract negotiations with the Maryland Chapter of the National Electrical Contractors Association.

The plaintiffs contended below that the IP had no constitutional authority to refuse permission for the strike or to revoke Local 28's charter for disregard of his order. They further contended that even if constitutionally authorized, the action was invalid because: (1) it was in breach of a duty owed to the Local and its members, and was taken in bad faith for improper reasons; (2) the Local was not afforded a fair hearing before a properly constituted tribunal; and (3) the revocation was unjust and an unreasonably severe sanction in the circumstances.

More particularly, the plaintiffs maintained that the IP improperly collaborated with the National Electrical Contractors Association (NECA) during Local 28's collective bargaining negotiations with the Maryland Chapter of NECA; illegally sought to impose a perpetual collective bargaining agreement on the Local; and harbored animosity toward the Local and its leadership because of their efforts to maintain local autonomy. Moreover, they asserted that by deciding the charges against Local 28 when his own good faith was called into question, the IP denied the Local a fair hearing—a defect which was not cured by the appellate review of the IBEW International Executive Council.

The International replied that the revocation was justified because by engaging in a strike contrary to the IP's order, Local 28 was in clear violation of the IBEW Constitution; that the revocation was reasonable and necessary to maintain proper union discipline, did not result from improper motives on the part of the IP, and was enforced only after fair procedures provided in accordance with law and the IBEW Constitution. It contended that, in any event, the plaintiffs' claims were barred by their own unclean hands and failure to exhaust intra-union remedies. The defendant also raised serious jurisdictional defenses.[1]

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1. The two cases rest on separate legal bases, although the same events are relied on as grounds for relief. The individual members' action, Parks, et al. v. IBEW, was brought under §§ 101, 102, 302, 304, 609 of the Labor Management Reporting and Disclosure Act (LMRDA) of 1959 (29 U.S.C.A. §§ 411, 412, 462, 464, 529) for injunctive relief and a declaratory judgment that revocation of the charter constituted unreasonably severe discipline of the members without a fair hearing, and also amounted to institution of a trusteeship over the Local. The District Judge ruled for the plaintiffs on the first ground, but found no evidence that the revocation was used as a means of circumventing the Act's trusteeship limitations. The Local's action, Union No. 28-IBEW v. IBEW,

The District Judge, after hearing evidence and argument for twenty-two days, held that the strike did require approval of the IP. He further held that there was no sufficient evidence that the IP had been moved by "express or particular malice, i.e., ill-will, spite, a grudge, or a desire to be revenged on a particular person or persons, resulting in a deliberate intention to commit an injury." 203 F. Supp. at 309. Nevertheless he concluded that the IP had acted from "mixed motives" amounting to "legal malice" in forbidding the strike and in revoking the charter. With respect to the fairness of the hearing and the severity of the discipline, the Judge upheld the plaintiffs.

The decree ordered the restoration of the charter of Local 28 and all appurtenant rights and privileges. It enjoined any retrial or future charges against that Local for any past conduct involving the issues in the instant cases, but did not preclude the proper officials of the defendant from pressing charges for such past misconduct against certain members who were the ringleaders in defying the IP's order forbidding the strike. The decree expressly did not enjoin disciplinary action for breaches of the defendant's Constitution occurring after the decree, including continuation of the present strike after reasonable notice from the IP "issued with proper motives." The charter of Local 24, which was organized by IBEW to take over the jurisdiction of Local 28, was ordered revoked. The plaintiffs' claims for damages and counsel fees were denied.

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was instituted under § 301(a) of the Labor Management Relations Act (LMRA) (29 U.S.C.A. § 185(a)) on the grounds that the IBEW Constitution was a "contract * * * between * * * labor organizations" within the meaning of that section, and that the IP's actions amounted to a breach of that contract entitling the Local to injunctive relief and damages. The District Judge granted injunctive relief but denied damages and counsel fees.

From the order of the District Judge for the restoration of the charter of Local 28 and the revocation of the charter of the newly created substitute, Local Union No. 24, the International appeals. From the denial of additional relief requested by the plaintiffs, they appeal. Local 24 has intervened on appeal claiming that as it was not a party to the action in the court below, that court's decree could not alter its status.

I. *FACTS*

The nature and complexity of the issues raised require not only close examination of the proximately operative facts, but also of the context in which the dispute developed. Particularly is it necessary to study the relationship, within the electrical contracting industry, of the IBEW with its component local unions and individual members, and with the principal employers' association, NECA. One cannot decide the issue of "breach of duty owed the Local and its members" without first considering carefully what were the respective duties resting in the IP, the Local, and its members.[2]

Organization and Structure of the IBEW

The IBEW, one of eighteen members of the AFL-CIO Building and Construction Trades Department, is about seventy years old and has 750,000 members organized into almost 1800 component local unions. About 150,000 of

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2. In addition to the District Court's decision now under review, reported as *Parks v. IBEW*, 203 F. Supp. 288 (D. Md. 1962), there have been several earlier District Court opinions that bear upon the present case. See *Executive Board, Local 28 v. IBEW*, 184 F. Supp. 649 (D. Md. 1960); *Local 28 v. Maryland Chapter, National Electrical Contractors Ass'n*, 194 F. Supp. 491, 194 F. Supp. 494 (D. Md. 1961); *Local 28 v. IBEW*, 197 F. Supp. 99 (D. Md. 1961).

these members work in the electrical construction industry. These belong to locals in the United States and Canada having about 800 working agreements with chapters of NECA and a few other employer associations.[3]

Local 28 received its charter from the IBEW in 1900, and through the years it has served as the uncertified bargaining representative for its members. As of June 1, 1961, it had about 1400 members, most of whom were employed in the electrical construction industry in Baltimore City and the ten nearby Maryland counties. As authorized by the IBEW Constitution, it includes among its members supervisory and managerial personnel who are restricted from voting or attending meetings. (IBEW Const. Art. XVII, § 6). See § 14(a) of the LMRA, 29 U.S.C.A. § 164(a).[4] The Local operated a hiring hall and provided a local pension and other benefit funds. Its welfare assets amounted to between one-half and three-quarters of a million dollars.

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3. NECA is a national association of employers in the construction industry; it is comprised of local chapters representing electrical contractors in particular geographic areas for purposes of collective bargaining. Some contractors who are not members also designate NECA or an area chapter as their collective bargaining agent.

The Maryland Chapter represents 26 electrical contractors doing approximately 80% of the major construction in and around Baltimore; over the years the Maryland Chapter has negotiated successive collective bargaining agreements with Local 28.

NECA offers advice and assistance to its chapters in collective bargaining matters. For years NECA and IBEW have conferred on a national level to further their common interest in stabilizing labor relations in the electrical construction industry. The principal vehicle for advancing this common purpose is the Council on Industrial Relations for the Electrical Contracting Industry of the United States and Canada. (CIR or Council).

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4. Its leadership includes *former* supervisors and contractors to whom these restrictions do not apply. The inclusion of such active members in a union is not illegal, and is traditional in this industry.

The organizational structure of the IBEW and the relations, rights and duties therein are pervasively governed by the International Constitution.[5] The International Convention (IC), comprised of representatives of the locals, is the ultimate governing body. During intervals between conventions control is in the International Executive Council (IEC), composed of nine members meeting quarterly, the International President and subsidiary officers.

Actualiy, effective control of IBEW activities is entrusted to the IP who, since 1955, has been Gordon M. Freeman. He is empowered to decide all controversies including questions of law (Art. IV, § 3(2)); to remove International officers for cause and to fill vacancies by appointment (Art. IV, § 2); to enter into agreements with national or international labor organizations or associations of employers, or with companies doing an interstate business in electrical work, to cover the entire jurisdiction of the IBEW (Art. IV, § 3(12)). "The I.P. can, in any situation, delegate the powers of his office to an International Representative, Vice-President or Assistant." (Art. IV, § 4). He may also appoint "a referee who may or may not be a member, to take testimony and report to him." (Art. IV, § 3(11)).

The IP's authority over local unions is notably extensive. (See Art. IV, § 3(8), (9), (10); Arts. XV & XVII). Locals receive their charters only upon his authorization. (Art. XV, § 1). He assigns the locals their jurisdiction, can merge or amalgamate locals or suspend or revoke a local's charter if it does not organize or protect its jurisdiction. (Art. XV, §§ 2-4). In addition, when necessary

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5. Many of the material provisions of the Constitution are set forth in 197 F. Supp. at 102 n. 2.

to protect or advance the interests of its members, the IP can take charge of the affairs of any local, (Art. IV, § 3(9)); he can also remove or suspend local officers for various reasons. (Art. IV, § 3(10)).

Locals may not affiliate with central labor councils and the like without his permission. (Art. XVII, § 5). Although locals are empowered to make their own bylaws and working rules, these are null and void if they conflict with the International Constitution.[6] And all bylaws, amendments and rules and all agreements of any kind are null and void unless approved by the IP who has the right to "correct" them to conform to the IBEW's Constitution and policies. (Art. XVII, §§ 7-9). In addition, no agreement can be abrogated without his approval. (Art. XVII, § 11); and no general work stoppage can be undertaken without his consent and "[t]he I.P., or his representative, has the power at any time to enter any situation or controversy involving a L.U. [Local Union] or any of its members, and the decision of the I.P., direct or through his representative, shall be accepted by the L.U. and its officers, subject to appeal to the I.E.C. and I.C." (Art. XVII, § 13). By way of ultimate enforcement sanction, the IP is empowered:

> "Either to suspend or revoke the charter of any L.U., or have the I.S. [International Secretary] reject the per capita tax from any L.U. that fails or refuses to observe the laws and rules of the I.B.E.W." (Art. IV. § 3(8)).

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6. Questions of conflict are necessarily decided by the IP who is empowered to decide all questions of law. (Art. IV, § 3(2)).

The Constitution provides that acceptance of an application for membership and admission to a local union constitutes a contract between the member, the local, the IBEW and all other members. (Art. XXII, § 3). Each new member is required to take an oath of allegiance to the IBEW and to conform to its Constitution and laws. (Art. XXII, § 4). A member may be penalized for violating the IBEW "Constitution and the rules herein, or the bylaws, working agreements, or trade and working rules of a L.U." or for "working in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W." (Art. XXVII, § 2(2), (9)). The IP is empowered to file charges against a member before the IEC. (Art. IV, § 3(7)).[7]

All decisions of the IP are subject to appeal, first to the IEC, meeting quarterly, and then to the International Convention, meeting every four years. (Art. IV, § 3(2)). The IEC is also empowered to try local unions or members, and may revoke or suspend charters or memberships. (Art. IX, § 4; see also Art. IX, § 6). No appeal is recognized unless there is compliance with the decision from which the appeal is taken and all appeals must be taken within 30 days of the decision which is being appealed. (Art. XXVII, §§ 16, 17).

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7. Provision is also made for automatic expulsion of a member or a local for resorting to a court of law without having fully exhausted internal remedies. (Art. XXVII, § 1 and Art. XVII, § 1). Even advising such resort is penalized. (Art. XXVII, § 2(1)). The legality of some of these provisions, in the face of §§ 609 and 101(a)(4) of the LMRDA, 29 U.S.C.A. §§ 529 and 411(a)(4), might be difficult to defend. See § 101(b) of the LMRDA, 29 U.S.C.A. § 411(b).

The Council on Industrial Relations
(CIR or Council)

The Council, a bipartite body consisting of NECA and IBEW representatives, was founded in 1920 by the IBEW and a predecessor employers' association. It consists of 12 persons, six representing each member organization, and additional alternates to assure the presence of at least four representatives of each organization at its quarterly meetings. There is a co-chairmanship of the chief executive of each organization; at all times pertinent to this case the co-chairmen have been Gordon Freeman, IP of the IBEW, and Paul M. Geary, Executive Vice-President of NECA.

While not strictly an arbitration body, primarily because the Council contains no neutral outsiders and exercises the power to alter the terms of agreements between IBEW locals and NECA chapters in its discretion, the Council functions to render final and binding decisions on collective bargaining issues submitted to it when local negotiations have reached an impasse. Its decisions must be unanimous, each representative voting separately. Although most disputes are decided upon submission of both parties, unilateral submissions are accepted when the collective bargaining agreement contains a Council clause and the submitting party has attempted in good faith but failed to effect a local settlement and has notified the other party of its intention to file and invited it to join the submission. Council decisions are reached in executive session after hearing argument and no final decision is reached until the Council adjourns, when the parties are simultaneously notified of the Council's action.

The Council's principal purpose is "to remove the causes

of friction and dispute in the electrical contracting industry" by providing a forum for conciliation and settlement of controversies between IBEW locals and NECA chapters. It has aided in creating a relatively "strikeless" climate within the electrical construction industry, and it is undisputed that by and large it has served the parties well over the years.

Council Clauses

With the encouragement of the two national organizations, IBEW and NECA, most collective bargaining agreements between IBEW locals and NECA chapters contain some form of Council clause. There are variations, but generally clauses require submission to the Council for binding decision of all disputes arising during the term of the agreement and proposed changes at the end of any contract year when the parties fail to arrive at an agreement locally.

Most Council clauses have in the past provided that the agreement was to run from year to year "unless changed as * * * provided" in the agreement. It had been generally assumed that such contracts were "evergreen," that is, it was considered that they were terminable only upon mutual consent of the parties or permission of the Council and that a unilateral attempt to terminate would be a dispute to be referred to the Council.

In August, 1959, NECA circulated to its chapters copies of a uniform Council clause, referred to in the evidence as the "yellow sheet" clause because it was printed on yellow paper. This was unambiguous in its "evergreen" character and specified that it was to "continue in effect from year to year * * * unless *changed or terminated* in the way

later provided herein. * * * Notice by either party of a desire to *terminate* the agreement [would] be handled in the same manner as a proposed change." (Emphasis added.) In 1956 the Council had adopted a policy of requiring the inclusion of "evergreen" Council clauses "where the matter of the Council agreement was in dispute." The District Court found that the IP had not made this policy known to the local unions or all the other International officers. It is undisputed that both the IBEW and NECA favor the inclusion of the broadest possible Council clauses in collective bargaining agreements between IBEW locals and NECA chapters.

Actually, only 20 of the some 800 collective bargaining agreements between IBEW locals and NECA chapters contain the "yellow sheet" "evergreen" clause. Eighteen of these were imposed by the Council itself; only two originated in local negotiations. Controversy over the meaning of the particular Council clause in the 1958 agreement between Local 28 and the Maryland Chapter, over inclusion of the recommended "yellow sheet" Council clause in their new agreement and over the legality of such a clause, forms a significant part of the present dispute.

Relations Between Local 28 and the International Prior to 1961

Since it is part of the plaintiffs' theory that the IP was unlawfully motivated in his actions, particularly by alleged ill-will originating in earlier misunderstandings between IBEW and Local 28, we turn now to those events.

Since 1958 two factions, one led by Eveson and Beck-

hardt and the other by King and Rost, have vied for control of Local 28. Although in the summer of that year Eveson was elected President, King was re-elected Business Manager and Rost, Financial Secretary. In September, 1958, Eveson, acting within the Local, attempted to bring its financial policies into line with its bylaws. When orders of Local 28's Executive Board supporting Eveson's efforts were ignored, he preferred charges against King and Rost by letter of January 26, 1959, addressed to IBEW Regional Vice-President Blankenship. On January 31, 1959, he requested an investigation by the IEC. On February 9, 1959, the IP sent International Representative Goidel to confer with the officers of the Local. Goidel imposed a trusteeship.[8] Thereafter he removed Eveson from office, but retained King and Rost, and suspended the Local's bylaws and the meetings of the Executive Board and general membership.

Among other acts objectionable to the local membership, Goidel, in a referendum on November 17, 1959, made two proposals relating to dues and assessments. The first involved a substantial increase in dues and the second the elimination of certain existing benefits. Over 75% of the members abstained from the balloting. On December 11, 1959, seven members of the Local, the present leadership, without first exhausting their internal remedies, filed suit in the federal District Court of Maryland to enjoin certification of the result of the referendum. About that time

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8. On October 14, 1959, in accordance with the requirements of § 301 of the LMRDA, 29 U.S.C.A. § 461, the International filed an initial trusteeship report with the United States Department of Labor stating that the trusteeship had been imposed because "the factionalism in the Local Union has prevented the officers thereof from properly organizing the electrical industry within the jurisdiction of the said Local Union."

the IP mooted the cause by refusing, because of the paucity of the vote, to accept the result of the referendum.

In March, 1960, Goidel, with the help of the IBEW General Counsel, filed charges with the IEC against the members who had brought the suit in December, 1959. Their failure to exhaust internal remedies was the basis of the charges. On March 22, 1960, the Executive Board of Local 28 responded by suing in the District Court, under Title III of the LMRDA, 29 U.S.C.A. §§ 461-66, to set aside the trusteeship.[9] The members of Local 28, against whom Goidel had filed charges, sued in the same court to enjoin the International from proceeding upon those charges.

Again the International mooted these cases.[10] There is no evidence of further difficulties between the International and Local 28 from August, 1960, to March, 1961.

Local 28 and the Maryland Chapter Contract Negotiations

Over the years Local 28 and the Maryland Chapter nego-

9. On May 11, 1960, Judge R. Dorsey Watkins denied a motion to dismiss this complaint. *Executive Board, Local 28 v. IBEW*, 184 F. Supp. 649 (D. Md. 1960).

10. On September 16, 1960, the IEC unanimously recommended that no action be taken on the charges filed by Goidel. The reason stated was that there was confusion as to the meaning of the recently enacted LMRDA in regard to its effect on the doctrine of exhaustion of internal remedies and the accused men had acted on information received from a Labor Department official.

In addition, elections were held within Local 28 in July, 1960; Eveson was re-elected President and Beckhardt was elected Business Manager in the place of King. On August 5, 1960, the IP unconditionally terminated the trusteeship pursuant to his earlier order dated June 30.

tiated a series of contracts containing Council clauses. The most recent of the series was agreed upon on March 7, 1958, and was duly approved by International President Freeman. It provided that it should take effect April 1, 1958, and remain in effect through March 31 of each succeeding year unless changed as provided therein; that notice specifying proposed changes must be submitted at least 60 days prior to April 1 of the contract year; that there should be no stoppage of work because of any proposed changes; and that the original agreement should remain in effect until all proposals had been satisfactorily resolved. The contract directed that matters in dispute, which the local negotiators failed to resolve, should be referred to the Council whose decision would be "final and binding on both parties."[11]

From 1922 to 1958 no dispute with respect to wages had been submitted to the Council by Local 28 or the Maryland Chapter. In 1958, 1959, and 1960 wage and related disputes were referred to the Council, which granted Local 28 hourly wage increases of 15¢, 17-½¢, and 10¢ in these three years, respectively. The court below found, and it is not contested, that the increases granted were "not unfair or unreasonable under all the circumstances." 203 F. Supp. at 299.

The form of "Council clause" in the 1958 agreement provided for submission of "proposed changes" to the Council but, unlike some clauses prior to 1955, did not refer to termination. Taking the position that the contract was unilaterally terminable at the end of any contract year,

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11. Provisions of this contract are more fully set forth in *Local 28 v. Maryland Chapter*, 194 F. Supp. 494, 495-96 (D. Md. 1961).

Local 28, on January 12, 1961, notified the Maryland Chapter in writing of its intention to terminate the existing contract in the event that it could not be modified to the mutual satisfaction of the parties.[12]

In the ten meetings that followed between February 6 and March 31, the parties remained far apart. Local 28 firmly insisted on a two-year contract, a 35¢ per hour increase the first year and a 30¢ increase the second, or alternatively a one-year contract with a 35¢ wage increase. At times during the negotiations the Local proposed a three-year contract—"35¢ for the first year and * * * comparable amounts for two years thereafter." 203 F. Supp. at 299. Such increases were claimed to be necessary to bring the union wage in Baltimore into line with the wage rates in Washington, Philadelphia, Wilmington and other large nearby cities. The Maryland Chapter, on the other hand, initially offered only 2¢ per hour more for each year. This offer was raised on March 27 to 5¢ per hour in return for a reduction in the number of paid holidays demanded by the union. The Chapter insisted that this was as much as was economically feasible in view of the strong competition of non-union contractors in Baltimore. The relative weakness of union labor in the Baltimore market made it unreasonable, said the Chapter, to insist on wage scales here comparable to other cities where union contractors do not face stiff non-union competition. The Maryland Chapter further contended that the contract could not be terminated unilaterally without Council approv[illegible]

12. Consistent with this stand, and in fulfillment of its statutory obligation, § 8(d) of LMRA, 29 U.S.C.A. § 158(d), on February 24, Local 28 also sent a "Notice to Mediation Agencies" to the federal and state agencies, notifying them that a dispute existed concerning the collective bargaining agreement, and of the proposed termination of the agreement.

Local 28, after notifying the Maryland Chapter of its intention to do so, brought an action on March 28, 1961, in the District Court for a declaratory judgment upholding its right to terminate the agreement as of April 1, 1961. On March 31 it notified the Chapter that it considered the agreement terminated. Thereafter, local bargaining sessions were temporarily suspended.

These developments were brought to the attention of the membership in a meeting of Local 28 on April 1, 1961, at which time the members were cautioned by Business Manager Beckhardt "to prepare yourself economically for the worst" but not to take any "action yourself that will embarrass yourself or the Union" as a strike prior to decision in the declaratory judgment suit might endanger the assets of the Local. The International learned of these occurrences in correspondence from Beckhardt to International Vice-President Blankenship, and through a meeting on April 11, between International Representative Frank Adams, who had been sent to Baltimore to assist in negotiations when NECA sent a representative to aid the Maryland Chapter, and officers of the Local. The International was also informed of the Local's demand for an immediate 35¢ wage increase and of its intention to strike if necessary to achieve it.

The District Judge found that the Local reasonably believed it had the support of the International in its efforts to obtain a substantial increase. This finding is apparently based on the correspondence between Beckhardt and IVP Blankenship. Precisely what Blankenship wrote was: "I assure you that Local Union 28 will have my support as well as any other IBEW Local Union that is consistent with the working agreement, *IBEW constitution*

and policy and Federal and State laws." (Emphasis added.) Moreover, as the court also found, International Representative Adams told the Local in April that in its wage demands it was "shooting for the moon."

While its International Representative was attempting to assist Local 28 in the negotiations, IBEW was conferring with the Maryland Chapter and with NECA in the first of several meetings concerning the litigation commenced by the Local. Thus, on April 7, 1961, Louis Sherman, General Counsel for IBEW, met with James P. Garland, attorney for the Maryland Chapter, and with other representatives of the Chapter and of NECA, at the Washington offices of NECA to obtain information on the status of the case and the legal issues involved. The testimony establishes that an underlying purpose was to determine whether IBEW or the Council should intervene in the litigation. One of the complaints of the Local is that it was not currently informed of these meetings.

On April 17, 1961, the Chapter's motion to dismiss the action against it was denied, see 194 F. Supp. 491; on April 21, the Chapter formally invited the Local to join in the submission of issues to the Council and notified the Local that otherwise it would do so unilaterally; and on April 28, the Chapter filed its case before the Council, presenting all issues previously exchanged between the parties, including the issue of "termination of the contract."

In the meantime, on April 25, without a formal strike vote, and without having sought or received permission to strike from the IP, about half of the members of Local 28 went out on strike. Ostensibly a wild cat strike, the Dis-

trict Judge found that it was in fact subject to the control of Eveson and Beckhardt, and of O'Doherty, Local 28's attorney.[13]

Collective bargaining between the Local and the Chapter was resumed on April 27, and the Council scheduled a hearing for May 15 on the issues submitted by the Maryland Chapter. On May 4 Local 28 filed another suit in the District Court to enjoin any decision by the Council based on the unilateral submission. This suit was consolidated with the earlier declaratory judgment action against the Maryland Chapter and a hearing was held on May 10 and 11. At its conclusion the District Judge orally announced his decision that the Local had the right to and did effectively terminate its agreement on March 31, 1961, as the terms of the agreement did not require the issue of termination to be submitted to the Council. The court intimated, without finding it necessary to decide, that if the contract were construed to be perpetual it would be invalid. Opinion, May 16, 194 F. Supp. 494.

At the court's suggestion, the parties agreed to continue to bargain in good faith, the Maryland Chapter agreed to take any appeal promptly, and the Local Union agreed with the concurrence of the large number of its members in the courtroom to return its members to work and to remain at work until a decision of the Court of Appeals was rendered "or until July 31, 1961, if no appeal is taken." 194 F. Supp. at 502. The court further suggested that the parties voluntarily submit their differences to the Council

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13. Other than to note its surprise, the Local makes no effort to contest this finding, except to point out that the finding was not that the strike was *caused* by the Local's leadership.

for conciliation, refusing either to require arbitration as requested by the Chapter or to enjoin the Council from rendering a decision as requested by the Local.

Thereupon, the members of Local 28 returned to work. The local negotiators resumed their meetings on May 13. There was discussion of a possible wage increase of 50¢ over a three-year period, an amount substantially higher than the last offer on May 5 which had been 5¢ for 1961, 5 for 1962, and 10 for 1963, a total increase of 20¢ under a three-year contract otherwise unchanged. By letter of May 14, Beckhardt reported to Freeman that management was coming up with "far more substantial offers."

On May 15, the Maryland Chapter's submission came on for hearing before the Council. Local 28 did not appear, but sent a letter to the Council setting forth its reasons and accusing the Chapter of not bargaining in good faith. The Chapter representatives informed the Council of the court's ruling of May 11, and requested that no binding determination be reached but that the Council confine itself to an advisory opinion. There is evidence that Freeman became angry and ordered the Chapter to proceed with its case.

After the hearing, the Council met in executive session for an hour and a half. The District Court found, on conflicting evidence, that a tentative decision was reached with the approval of the IP allowing a 10¢ per hour wage increase. The existing contract was to remain otherwise unchanged. At this particular stage, apparently, there was no insistence on an "evergreen" clause. Final action, however, was deferred and on June 2 the Council announced that in view of the pending litigation no decision would be issued.

In the meantime, on May 18, the negotiating committee met and management again increased its offer—10¢ for 1961, 10¢ for 1962, and 5¢ for 1963. Though the Chapter's new offer of 10¢ for 1961 coincided to that extent with the Council's tentative decision of May 15, the District Judge found as a fact that Local 28 had failed to prove that knowledge of the tentative decision reached the Chapter.

The Chapter promptly noted its appeal from the judgment of the District Court in the declaratory judgment case. Thereafter, sometime before June 2, Freeman and Geary (the NECA chief executive) conferred; Geary stated that he was recommending dismissal of the appeal, and Freeman assured him that he would do all that he could to see that Local 28 would submit to the Council all issues, concerning a new contract, which were not resolved on a local level. At a further meeting on June 2 in Sherman's office between him, Geary and the attorneys for NECA and the Maryland Chapter, it was decided that the appeal should be dismissed. Shortly thereafter, Geary sent a representative to advise the Maryland Chapter with respect to its negotiations, particularly to ask for the Council's recommended "yellow sheet" Council clause. At the next bargaining session on June 5, the Chapter's proposed terms for a new one-year contract were a 10¢ wage increase plus the "yellow sheet" Council clause.

The June Strike

The Maryland Chapter dismissed its appeal on June 9. Local 28 held a strike meeting on June 13. Answering a question from the floor as to whether the IP had consented to the strike, Business Manager Beckhardt falsely an-

swered that the Local had been given the "green light." The vote was 740 to 79 in favor of a strike to begin June 16. By telegram of June 14, the Local notified the IP of the strike, adding, "Any instructions from you would be appreciated."

The IP's telegraphic reply of June 15 advised that a strike without his consent would be a violation of the Constitution. He reminded the Local that in the recent case against the Maryland Chapter it was agreed that the members of the Local Union would return to work and continue working until decision on appeal or until July 31 if no appeal were taken. The parties, he added, had agreed to continue bargaining in good faith. He noted that the Chapter s appeal had been dismissed, and that it had been agreed that the members would "continue at work during collective bargaining* * * until July 31, 1961." He refused his consent to a strike or other work stoppage, and instructed the officers to permit no such strike. The reasons he gave for his refusal were that the Local was violating the suggestions of the court, that it had not asked permission to strike in advance, that it was the general policy of IBEW to favor reference of all collective bargaining disputes to the Council when the agreement contained a Council clause, and that he felt that a Council clause could be negotiated which would be acceptable to both parties.

The IP's telegram was received before the strike began, but the local officers did not then inform the members. The telegram was discussed at a meeting of the Local's Executive Board on June 16. A meeting of the membership was called for June 22, and in the meantime, on June 19, the strike was allowed to begin. On June 19, the Local answered the IP by telegram, and the next day its officers

met him in Washington. In justification of the strike, it was argued to Freeman that the Local's agreement with the court was to work only until an appeal was taken and decided, and that the appeal had been taken and dismissed; that the Maryland Chapter was not bargaining in good faith in insisting on a perpetual Council clause; that on account of this the Local was filing charges with the NLRB; and that Local 28 had good hopes of success and had already signed up a few individual contractors at the 35¢ figure.[14] The local officers also contended that this was not a general work stoppage within the constitutional prohibition.

Freeman again refused to consent to the strike. He wished the Local success in its negotiations, but repeated that he wanted issues which the parties were unable to resolve to be referred to the Council. He said he would do nothing until the meeting of the Local called for June 22, and the Local's officers, though refusing to promise to send the men back to work, agreed to read the IP's telegram to the members at that meeting.

The meeting of June 22 was attended by an International Representative sent by Freeman. Local 28's attorney, O'Doherty, read the IP's telegram and addressed the members at length. He expressed disagreement with the IP's interpretation of the IBEW Constitution and criticised the International and the Maryland Chapter. O'Doherty called for a vote of "non-concurrence" with the IP, which was overwhelmingly given.

14. These agreements providing for a 35¢ wage increase were subject, however, to the condition that the Local would refund the difference between that figure and any lesser amount ultimately agreed upon with the Chapter.

Meetings of the local negotiators had been held on June 12. On June 16 and 17 they met before a Federal Mediator, and there were additional meetings in June but no satisfactory accord was reached. Local 28 would not recede from its demand for a 35¢ wage increase for 1961 other than to offer to split its demand by accepting 10¢ April 1, 10¢ August 1, and 15¢ December 1, 1961. The Maryland Chapter, on the other hand, while raising its offer on June 16 to a 20¢ increase for 1961 as part of a three-year contract, insisted on a "yellow sheet" Council clause which was unacceptable to the Local. Collective bargaining ceased on July 6, when the Maryland Chapter broke off negotiations.[15]

The Charter Revocation

After Local 28 voted to disobey the IP's order not to strike, Freeman never waivered in his determination to assert the authority of the International and to terminate the unauthorized strike.

Shortly after the strike began, he gave Geary his assurance that he would do whatever he could to obtain other union employees for the NECA contractors, and

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15. Local 28 filed charges on June 19 before the NLRB accusing the Maryland Chapter of bargaining in bad faith in insisting on a perpetual contract. This charge was dismissed without prejudice on July 6, after the Chapter took the position before an NLRB examiner that it wanted such a contract but was not insisting on it. The same day, the Chapter, at the suggestion of its attorney and of the NECA Eastern Regional Director, broke off collective bargaining negotiations, charging Local 28 with failure to bargain in good faith. On July 27, Local 28 filed charges against the Chapter and two of its member contractors alleging coercion of members, and on October 3, 1961, charged the Chapter before the NLRB with a failure to bargain in good faith from April 4, 1961. The plaintiffs' counsel have attested in their brief that the Labor Board has suspended its proceedings on these charges pending the disposition of the current litigation.

some men were brought to Baltimore to work. He also informed other unions in the building trades that Local 28's picket lines need not be honored. On June 23, he notified Local 28 that he was sending International Representative Alfred Terry to investigate the work stoppage. Terry arrived in Baltimore on June 23 clothed with authority to investigate not only the strike but also the possibility of establishing a new local in Baltimore. On the 26th he met with officers of the Local, and on the 28th sent the IP a memorandum reporting on the Local leadership's attitude and its request that the IBEW stay out of the situation.

On June 23, O'Doherty wrote Freeman reiterating the Local's position and asking for International support. Freeman's reply on July 7 characterized the Local's action as a challenge to the authority of the IBEW, and he informed O'Doherty that charges had been filed against the Local. The same day the International served on Local 28 an order, prepared by IBEW counsel and signed by Freeman, requiring it to show cause before an independent referee on July 17, why its charter should not be revoked for engaging in a strike in violation of Art. XVII, § 13 of the IBEW Constitution.[16] The specific charges related to the strikes of June and of April 25 to May 16. The referee was appointed pursuant to Art. IV, § 3(11) of the Constitution to take testimony, make findings of fact, and report to the IP, but Freeman reserved to himself all questions of law as well as the ultimate decision.

16. Copies of this order were sent to each member of Local 28 on July 7 together with copies of the correspondence between the IP and O'Doherty. On July 14, Freeman wrote another letter to each member. He included a copy of the Constitution and explained the effect revocation would have on them. He further explained their obligations to the International and assured them that the Local could not validly discipline them for returning to work.

Freeman and Sherman met with Beckhardt and O'Doherty on July 12 in Washington at the latter's request. The Local indicated its unwillingness to go to the Council and its fear that a continuous "yellow sheet" Council clause might be imposed upon it by the Council, and suggested that the terms of a new contract be referred to independent arbitration. This offer Freeman rejected, stating: "* * * if we are going to have arbitration, why not take advantage of existing machinery that has proven satisfactory for a number of years?" He refused to assure the Local that it would not be required to accept the "yellow sheet" clause.

Although during examination of the IP the District Judge appeared to assume that the Local had knowledge, at the time of this meeting, of the Council's policy of imposing an "evergreen" clause when the issue of termination came before it, in his decision he found that the IP did not then inform the Local of this policy. However this may be, it is clear that the IP insisted that the Local must return to work and submit all unresolved issues to the Council to avoid disciplinary action.

Prior to the hearing before the independent referee, the Local requested the right to examine the IP and certain other International officers, but Freeman refused to appear because "in the final analysis [he] would have to make a decision in the case." The charges were prosecuted by IBEW General Counsel Sherman, but were limited to the strike of June 16, as Sherman withdrew the charges relating to April "for the purpose of expediting the proceeding." On July 25, the referee reported his findings to the IP that the Local had gone out on strike on June 19 and continued the strike without requesting or receiving

consent of the IP, that this was a work stoppage requiring the IP's permission, that by his telegram of June 15 the IP had refused his consent, and that this fact was known in sufficient time to have canceled the strike.

After hearing argument from O'Doherty and Sherman on July 28, the IP indicated his view that Local 28 was in violation of the Constitution, but deferred his decision pending further review. His decision, prepared with the advice of the General Counsel, Sherman, and rendered on August 1, concluded that Local 28 had deliberately and willfully violated the IBEW Constitution. He ordered the Local's charter revoked, its jurisdiction transferred to a new local union, and appropriate legal steps to collect and administer or distribute the Local's assets and trust funds. He directed that the order should take effect on August 7, unless, in the meantime, the members took anew the IBEW Oath of Obligation, terminated the strike, and agreed to refer all unresolved collective bargaining issues to the Council for final and binding decision. His direction added, "it being understood that the Local shall not be required to accept the Council clause ruled terminable by Chief Judge Thomsen [in the *Local 28 v. Md. Chapter* case] decided May 16, 1961."[17] Copies of the order were mailed to all members of Local 28, with a letter from Freeman explaining the action that must be taken to comply, and the consequences to the Local and its members of failure to comply.

On August 2, Local 28 noted its appeal to the IEC from the IP's decision. On August 5, by a vote of 991 to 2, its

17. The text of this order is set forth in 197 F. Supp. at 104 n.4.

members supported the officers in their defiance of the IP's order.

Meanwhile, on July 17, while the independent referee's hearing was in progress, Local 28 filed an action in the District Court against the IBEW and the IP alleging breach of the IP's duty to the Local in the course he was following regarding the strike, and that his intent was to require the Local to surrender its autonomy. The District Judge refused to issue a preliminary injunction. He found that no denial of procedural due process had been shown by any fact alleged or presented at that time, and that it had not been demonstrated that the appeal taken by Local 28 to the IEC would be futile, delayed or otherwise unreasonable. He dismissed the complaint "without prejudice." *Local 28 v. IBEW*, 197 F. Supp. 99. On August 14, the individuals' complaint was filed in the District Court in *Parks, et al. v. IBEW*.

On September 12, 1961, Local 28's appeal to the IEC was heard. Counsel was allowed to present argument and read from depositions of Freeman and Geary with respect to the IP's good faith in revoking the charter. After supplemental briefs were filed, the IEC, on September 30, affirmed the IP's order in every particular, holding "beyond question" that the IP had conducted himself properly in revoking the charter. The District Court refused to find that the IEC was prejudiced. The reinstitution of legal action by Local 28 followed on October 18.

Local 24

During July, before the revocation, International Representative Terry remained in Baltimore making himself

available to the members of Local 28 to explain the position of the International with regard to the strike. On August 27 a charter was granted to Local 24. The initial membership, numbering about 30, adopted bylaws and elected temporary officers. It included a number of Local 28 members who had been supervisory personnel and officers of key members of the Chapter, but who had resigned their offices in their companies. When permanent officers were elected, however, several hundred men had joined Local 24.

In September, an agreement was reached between Local 24 and the Maryland Chapter for a 25¢ wage increase for each of two years. This agreement originally contained the continuous "yellow sheet" Council clause, but it was deleted by IP Freeman who testified that he did so to make the contract accord with the court's earlier ruling. On October 27, Freeman wrote to each member of Local 28 stating the IBEW position that members transferring to Local 24 would not lose their interest in the funds of 28.

As of March 31, 1962, Local 24, which was an open union accepting all applications for membership from qualified electricians, had some 1300 members, of whom 240 had transferred from Local 28. Local 28 was a "closed union," limiting membership to increase the employment opportunities of its members.[18]

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18. The District Judge found that Local 24 had been from its inception and continued to be dominated by the International. On appeal Local 24 argued that encouragement and aid in its establishment was an appropriate exercise of the International's function.

The District Court found that two leading contractors of the Maryland Chapter had cooperated with Terry in the formation of Local 24. On appeal Local 24 argues that this finding and any legal consequences are matters within the exclusive purview of the NLRB.

II. *LEGAL DISCUSSION*

Although courts are generally reluctant to interfere in internal union matters, at common law they have, nevertheless, established various norms to determine the legality and fairness of union disciplinary action. Professor, now Soliciter General, Cox has commented that a number of broadly procedural requirements have been imposed upon union action by the state courts.[19] As the District Court found, the few published decisions touching upon issues involved in the revocation or suspension of a local union's charter have generally taken the view that the procedural requirements governing the expulsion or suspension of an individual member likewise govern revocation or suspension of a local's charter. Although many of the decisions addressed themselves primarily to procedural aspects of fair hearing, there is no indication against a carry-over

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19. "Upon the theory that improper expulsion violates the member's interest in the organization's property or a contract between him and other members made up of the constitution and by-laws or, in recent years, upon the ground that there is a tortious interference with an advantageous relationship, the state will set an expulsion aside upon any of five grounds:

"(1) The procedure violated the union's constitution or by-laws.

"(2) The constitution or by-laws did not authorize expulsion for the alleged offense.

"(3) The procedure, although it conformed to the union's constitution and by-laws, did not afford the member a fair hearing.

"(4) The expulsion, although it was authorized by the union's constitution and by-laws, was unreasonable, contrary to 'public policy,' or contrary to 'natural justice.'

"(5) The expulsion was in bad faith because the purported ground was only a pretense for getting rid of a troublesome member."

Cox, "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959," 58 Mich. L. Rev. 819, 835-36 (1960). *Accord*, Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 615 (1959); see Sherman, "The Individual Member and the Union: The Bill of Rights Title in the Labor-Management Reporting and Disclosure Act of 1959," 54 Nw. L. Rev. 803, 820-21 (1960); Summers, "American Legislation for Union Democracy," 25 Modern L. Rev. 273, 279-83 (1962); see generally, Summers, "The Law of

to include the more substantive of Professor Cox's five requirements.[20]

While these standards for judicial intervention were developed under state common law, it was appropriate for the District Court to accept Professor Cox's formulation as a guide for decision in these cases arising under federal law. The Supreme Court has told us that in fashioning federal law in suits brought under section 301 upon collective bargaining agreements, "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957). It has not been suggested in this case that the same may not be done in suits based on "contracts * * * between * * * labor organizations." In addition, it is ap-

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Union Discipline: What the Courts Do in Fact," 70 Yale L. J. 175 (1960); Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951); Annotation, 21 A.L.R.2d 1397 (1952).

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20. See *Ellis v. AFL*, 48 Cal. App.2d 440, 120 P.2d 79 (1941); *Hatch v. Grand Lodge Brotherhood of Railroad Trainmen*, 233 Ill. App. 495 (1924); *Gardner v. Newbert*, 74 Ind. App. 183, 128 N.E. 704 (1920); *Mixed Local v. Hotel & Restaurant Employees International*, 212 Minn. 587, 593, 4 N.W.2d 771, 775 (1942); *Naylor v. Harkins*, 11 N.J. 435, 94 A.2d 825 (1953) *(affirming issuance of a preliminary injunction)*, 32 N.J. Super. 559, 571, 109 A.2d 19, 26 (App. Div. 1954), *ordering a permanent injunction and reversing*, 27 N.J. Super. 594, 99 A.2d 849 (Chancery Div. 1953); *Mayer v. Hutcheson*, 18 N.Y.S.2d 691 (Sup. Ct.), *reversed on other grounds*, 260 App. Div. 150, 20 N.Y.S.2d 698 (1940), *aff'd* 285 N.Y. 832, 35 N.E.2d 501 (1941); *Moore v. Moreschi*, 179 Misc. 475, 39 N.Y.S.2d 208, *aff'd without opinion*, 265 App. Div. 989, 40 N.Y.S.2d 334 *aff'd with modifications as to scope of injunction*, 291 N.Y. 81, 50 N.E.2d 552, *modified according to mandate*, 182 Misc. 264, 44 N.Y.S.2d 402 (1943); *Shrank v. Brown*, 192 Misc. 80, 80 N.Y.S.2d 452 (1948), 192 Misc. 603, 81 N.Y.S.2d 687 (1948), 194 Misc. 138, 86 N.Y.S.2d 209 (1949); *International Union of Operating Engineers v. Pierce*, 321 S.W.2d 914, 918, 919 (Tex., S.Ct. 1959); *Washington Local Lodge No. 104 v. International Brotherhood of Boilermakers*, 33 Wash.2d 1, 68-71, 203 P.2d 1019, 1058-59 (1949); see also, Annotation, 21 A.L.R.2d 1397, 1403 (1952); 87 C.J.S. *Trade Unions* (1954) § 45.

propriate for federal courts, relatively inexperienced in handling internal union cases, to look to existing state law concepts in applying the new provisions of the LMRDA.[21]

The District Court's Opinion

In deciding the merits the District Court specifically held that Local 28 called the June strike in violation of Art. XVII, § 13 of the IBEW Constitution, which required the IP's authorization, and that the Local failed to take the opportunity available under Art. IV, § 3(2) and Art. XVII, § 13 of the IBEW Constitution, to appeal to the IEC from the IP's determination that this was a strike requiring his consent. In addition, it held that when the IP later revoked Local 28's charter, as he was empowered to do, see Art. IV, § 3(8) of the IBEW Constitution, he was motivated in part by a legitimate desire to punish the Local and its members for conducting an unauthorized and forbidden strike.

The court nevertheless concluded that the IP's action breached his and the International's fiduciary obligation to Local 28 under the International Constitution, and thereby also violated rights of the Local's members which are protected by the LMRDA.

First, the District Court held that the revocation hearing was not fair because the IP was not an impartial and

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21. Summers, "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 176-77 (1960); see *Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 78-79 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961); *cf., Highway Truck Drivers Local 107 v. Cohen*, 182 F. Supp. 608, 617 (E.D. Pa.), *aff'd per curiam on other grounds*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

unbiased judge. Although the IEC was found to be unbiased, the court concluded that the review by that body did not cure the defects in the initial proceeding for the review was appellate only and not a trial *de novo*. Second, the court held that the IP's action had been partially motivated by "improper reasons," in breach of his and the International's fiduciary obligation owing under the International Constitution. Finally, the court concluded that the sanction imposed was unreasonable and unjust under all the circumstances in that the rank and file members had been innocently caught in the middle of a dispute between the leaderships of the Local and International.

Obligations Of and To IBEW

While clearly correct in its recognition of the theoretical basis for judicial intervention, we think that the court erred in applying these principles to the facts it had found. Although there is no hint of corruption and the court specifically declared that there was no sufficient evidence that the IP was moved by "express or particular malice, i.e. ill-will, spite, a grudge or a desire to be revenged on a particular person or persons, resulting in a deliberate intention to commit an injury," it nevertheless held that the IP "did act willfully and intentionally, for the purpose, inter alia, of imposing severe discipline on the members of Local 28, and without due regard for the duty he owed to them, as well as the IBEW as a whole. In that sense his action amounted to legal malice." 203 F. Supp. at 309.

The primary basis for the holding of "legal malice" was that the IP had acted from "mixed motives" to impose the discipline.

What are these "mixed motives"? The court found that although the IP had acted "to maintain necessary union discipline" (*Id.* at 308) and was untainted by express or particular malice, ill-will, etc., he had improperly moved "to rid himself of troublesome leadership in the Baltimore area, and to discipline the members of Local 28 for their refusal to agree to submit their disputes to the Council and for having brought several suits against him and the IBEW." *Id.* at 308. The wrongful ingredient in the "mixed motives" cannot be that the IP acted to rid himself of troublesome leadership or to discipline members; he is clearly empowered to do both of these things—especially in response to an unauthorized strike, as the court itself recognized. The imputed impropriety rests on the court's finding that the IP was moved not only by the unauthorized strike but also by the fact that the plaintiffs had earlier brought suits challenging the International and refused to submit disputes to the Council. It is plain that the court's decision is almost wholly based upon a belief that because of the manner in which the International resisted the Local's will in collective bargaining, it breached its fiduciary obligation to the Local and its members. This needs to be examined.

Before discussing the propriety of the intervention by the International in the Local's collective bargaining, it is appropriate to note that the District Court found that the IP had been motivated in part by a legitimate desire to discipline the Local, its members and officers, for having engaged in an unauthorized strike even after his repeated orders to return to work.

The calling of a strike is such a momentous step in a labor controversy that it is usually subjected to strict con-

trol by international unions.[22] The strike is a weapon that can bring an employer to his knees; but the effect on the employer can be too devastating for the union's own good. In addition, a strike can result in undue loss of production, harmful to the public, and a strike can waste a union's funds and otherwise weaken it in its continuing effort to better its adherents' wages and working conditions.

It is widely felt that vesting control in the international over the strike weapon assures that generally only intelligent and responsible use will be made of it after the greater interests of the international and the general economy have been considered. Such is the potential harm from indiscriminate resort to strikes that Professor Summers has commented that an international is justified in adopting severe disciplinary measures, including expulsion of individual members or revocation of a local union's charter, when an unauthorized strike has been undertaken. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1065-66 (1951).

The refusal to sanction the June strike cannot be said to be a breach of a fiduciary duty owed the plaintiffs under the Constitution. If the IP believed that an appropriate Council clause could be negotiated and that Local 28 was excessive in its demands and "shooting for the moon," it was his prerogative to restrain the Local, and if possible to counteract its headstrong determination to wage a strike that could adversely affect the cause of his international

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22. Barbash, *Labor's Grass Roots* (1961) pp. 150-51; *Leiserson, American Trade Union Democracy* (1959) p. 321; Anderson, "Landrum-Griffin and the Trusteeship Imbroglio," 71 Yale L. J. 1460, 1462 (1962).

organization.[23] His duty was to 750,000 members, not merely to a few who might gain a short-range advantage that could prove costly to the parent body, the employers, the public and, in the long run, to the plaintiffs themselves.[24] The International was dealing day by day with many chapters of NECA and the International's relations with NECA were important to the welfare of all 150,000 who worked in the construction industry.

Severe measures were taken against the Local, but only after full opportunity had been given the strikers, first to comply with the IP's back-to-work order and later, in the revocation decision itself, to redeem themselves. That this may be the first instance in which this International revoked a local's charter for going out on an unauthorized strike is not particularly relevant, since there is apparently

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23. The District Judge found that in refusing consent to the strike "the IP was * * * primarily moved by a desire to acquire and retain as much control as he could over the negotiations with the Maryland Chapter, because he distrusted Eveson, Beckhardt and O'Doherty and other leaders of the group that controlled Local 28, as the result of previous difficulties * * *." 203 F. Supp. at 302.

Under the International Constitution it cannot be said that the IP could not legitimately desire to intervene in the negotiations. In addition, the District Judge specifically held that this was a strike requiring the IP's consent and that the IP's refusal was not appealed to the IEC, 203 F. Supp. at 306, in which case the plaintiffs have waived judicial review of this action of the IP. Thus, while the refusal to sanction the strike must be taken as valid and cannot be impeached directly, the result of the court's decision is to impeach it indirectly. The revocation was the lawful means chosen by the IP to terminate the forbidden strike as well as to discipline the recalcitrants. In the circumstances it would seem to have been the only effective means to restore industrial peace.

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24. The District Court in fact observed that a 35¢ increase "would have brought Local 28's scale about in line with neighboring cities, although it may have been unrealistic in view of the strong non-union situation in Baltimore." 203 F. Supp. at 302 n.24.

no precedent for the obdurate persistence of this Local after ample warnings.

Although this court recognizes that in determining the validity of disciplinary proceedings there is an obligation to draw upon standards of fairness beyond those expressed or embraced in the union constitution, much more is in question here than the mere propriety of an act of discipline. Even as formulated by the District Judge, the issues involve considerations of basic union policy and structure, i.e., how shall the power over collective bargaining be distributed within the labor organization?

What has been granted the parent body as its proper province in collective bargaining and what has been retained by the local—perhaps it is more accurate to put it the other way: what has been retained by the parent and what has been granted to the subordinate—is a matter of internal government resting upon the contract the local and its members have made in accepting a charter from the parent. This court is advertent to the prevailing policy favoring internal union democracy[25] and, of course, it recognizes that in appropriate cases courts may intervene to redress grievances arising from the imposition of discipline upon locals or individual members; but, in the absence of specific legislation, it does not lie within the authority of a court to give effect to its general preferences between international power and local autonomy in matters of collective bargaining. Questions as to how rela-

25. See the LMRDA, 29 U.S.C.A. § 401 *et. seq.*; see also, e.g., Cox, "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959," 58 Mich. L. Rev. 819, 829-31 (1960); Summers, "American Legislation for Union Democracy," 25 Modern L. Rev. 273, 273-79 (1962).

tions between an international and its local might best be regulated are for internal settlement or for Congress, which possesses the legislative power. Judges lack that power even when they are convinced of the desirability of improvements in the law.

Although state courts have traditionally exercised some supervisory function over local-international relations,[26] and the federal courts are now empowered to intervene in some areas under a number of provisions of the LMRDA, federal judges may not, on their own, cure whatever deficiencies they may think exist in the pattern the parties have fashioned.

In return for the strength the local gets from the international it accepts a measure of international control.[27] This is plainly spelled out in this Union's Constitution, and as a rule such a structural arrangement has been thought necessary in the labor movement. As Professor Barbash has written, "When a local union makes a collective bargaining decision which seriously prejudices larger interests in the union, these latter are to all intents and purposes being excluded from a voice in a decision on

26. See, e.g., Cohn, "The International and the Local Union," 11 N.Y.U. Ann. Conf. Labor 7 (1958); Summers, "Union Schism in Perspective: Flexible Doctrines, Double Standards and Projected Answers," 45 Va. L. Rev. 261 (1959).

27. The District Court correctly recognized that:
"The evidence in the instant cases, however, makes it clear that those [worthy] results [of the Council's service] have been achieved through a tight control over the agreements of most local unions by the international officers of the IBEW, particularly the IP, at the cost of a large measure of the autonomy of the local unions. The IBEW Constitution gives at least lip service to the principle that the local unions shall do the collective bargain-

which (democratically) they have a right to be heard."[28]

The broad mandate of power to the IP made by the Union Constitution is designed to be used by him to promote such methods of collective bargaining as seem conducive to the interests of the entire organization. If the policy of the IBEW is to favor the Council device, or if in the IP's discretion it seems suitable in a particular instance, or if in his judgment an impending strike is not an appropriate bargaining weapon, there is nothing in the law that forbids his insisting that the local accede to his judgment. When the IBEW's Constitution and its experience over the years are brought into focus, such insistence by the IP in this case could well have been thought by him the only feasible method of accomplishing a peaceful and proper solution of the dispute between Local 28 and the Maryland Chapter.

We have seen in the statement of facts how completely committed the IBEW has been over a span of decades to the policy of requiring its locals to bargain collectively before the CIR, the chosen instrument for the resolution of disagreements which could not be settled at the local level. And it is undisputed that this policy has served the

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ing for their members but it also contains provisions which appear to authorize the control over the affairs of the local unions exercised by the IP.

"The provisions which shall be included in the constitution and the policies which shall be followed by the officers are matters for the union as a whole to decide, subject to the restraints imposed by law. Federal courts may impose such restraints only within the jurisdictional limits provided by Congressional enactments, and must follow the policies established by the statutes, as interpreted by authoritative decisions." 203 F. Supp. at 310.

28. Barbash, "Power and the Pattern of Union Government", 9 Lab. L. J. 628, 633 (1958); see also, Anderson, "Landrum-Griffin and the Trusteeship Imbroglio," 71 Yale L.J. 1460, 1462 (1962); *cf.*, Spitz, *Democracy and the Challenge of Power* (1958) pp. 82-84.

parties well over the years.[29] The IP, as a witness in court, made no concealment of the fact that he favors Council clauses in all agreements and that he has on occasion used pressure on reluctant locals to accept them, even to the extent of threatening to transfer one local's jurisdiction to another.

Additionally, the conferences between IBEW, NECA and Maryland Chapter officials, relative to the Council and other matters of mutual concern, e.g., the meetings in which it was decided not to appeal from the District Court's order ruling the 1958 agreement terminable, cannot in fairness be cast in the sinister terms of a breach of fiduciary obligation to the Local. Even as it spoke of the International's duty to the Local the court itself recognized that "the officers of the International and of NECA have

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29. During the trial in Local 28's action to determine the terminability of the 1958 agreement the court declared:

"I am not saying that the arbitration clause is not a very good thing. It obviously has been a splendid thing for the industry. It has prevented strikes and the whole system is a good system.

* * * * *

I do not make any criticism of the Council, * * * it is perfectly obvious over the years it has done a fine job * * *."

In its opinion the court said:

"Certainly, it is highly desirable that the local unions of the IBEW and the chapters of NECA take advantage of the services of the Council; the evidence shows that it has served all parties well over the years." 194 F. Supp. at 501-02.

In the opinion under review the District Judge concluded that the wage increases granted by the Council to the Local in 1958, 1959, and 1960 were:

"* * * not unfair or unreasonable under all the circumstances, including the wage rates of comparable building trades in Baltimore, where unions are not as strong as in Philadelphia, Wilmington and Washington." 203 F. Supp. at 299.

And most specifically the court stated:

"I adhere to the view that the Council has served the parties well over the years. Wages have steadily increased, in line with other comparable building trades, and there have been remarkably few strikes." 203 F. Supp. at 310.

a common interest in the Council as a means of stabilizing labor relations in the industry, which renders a large measure of cooperation between the two national organizations reasonable and desirable." 203 F. Supp. at 300 n.22.[30]

While there is talk by the plaintiffs of local autonomy, it is plain that under the International Constitution the local can neither make nor abrogate a collective bargaining agreement without the IP's sanction. (Art. XVII, §§ 7-9, 11). That official is authorized to intervene in local negotiations at any stage and may negotiate agreements covering the entire industry, thereby pre-empting the local's autonomy. (Art. XVII, § 13; Art. IV, § 3(12)). The policy underlying this Union's Constitution and its practice has been to permit the International's intervention, if that is deemed necessary to prevent an interruption in the

30. Findings that IBEW, NECA and Maryland Chapter officials cooperated in the founding of Local 24 by dissident members of Local 28, including supervisory personnel of two employers who had resigned their supervisory positions to take a more active part in union activities, were also a part of the *res gestae* that led the court to hold that the IP acted with "legal or constructive malice." We are of the opinion that, in this industry where there is admittedly close rapport between employers and the union and relatively free mobility between the employer and employee categories, the activities shown to have occurred during the formation of the new Local cannot be said to have breached a fiduciary obligation owed by the International to the existing Local and its members.

While not a breach of fiduciary obligation under the facts in this case, to the extent that there may be employer domination of the new Local, as comprehended under § 8(a)(2) of the LMRA, 29 U.S.C.A. § 158(a)(2), the matter is for the Labor Board to rectify.

To the extent that members of Local 28 who hereafter join Local 24 may be denied equal rights within Local 24, in violation of § 101(a)(1) of the LMRDA, 29 U.S.C.A. § 411(a)(1), the plaintiffs are complaining of matters that may more properly be raised in new proceedings where concrete facts of alleged specific denials of equal right to particular individuals may be adduced. cf., e.g., *Poe v. Ullman*, 367 U.S. 497 (1961).

work when a breakdown has occurred in the local negotiations. The durability of the Council evidences that participation of the International is the accepted format of collective bargaining in this industry.[31]

Here it was not misconduct or a violation of fiduciary obligation for the IP to press for the reference of all unresolved bargaining issues between the Local and the Maryland Chapter to the Council for final solution. This is all that the District Court found the IP had told Geary, NECA chief executive, that he would do. The IP's decision denying permission to strike and his revocation order were consistent with this.

One of the unresolved issues between the Local and the Chapter was whether a Council clause should be included in the collective bargaining agreement and, if so, what its scope should be. Even if it is assumed that at the time of the strike the IP was irrevocably committed to the imposition on the Local of a "yellow sheet" "evergreen" clause,[32] such a clause would do no more than keep the parties negotiating during a dispute instead of engaging in industrial warfare. As Professor John T. Dunlop,

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31. Although the general literature bearing directly on international union intervention in local negotiations is sparse, there are indications of a tendency toward increased international control in collective bargaining. See Barbash, *Labor's Grass Roots* (1961) 149-50; Leiserson, *American Trade Union Democracy* (1959) 287-88; Anderson, "Landrum-Griffin and the Trusteeship Imbroglio," 71 Yale L. J. 1460, 1462-63 (1962); see also, Pierson, "Multi-Employer Bargaining," in Bakke, Kerr and Anrod, *Unions, Management and the Public* (1960) 343-49; Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management* (1960) 927-30.

32. The evidence on this point was conflicting. Although the District Judge intimated that the IP was so committed, he made no specific finding to this effect. See 203 F. Supp. at 298, 302 n.27, 304.

Chairman of the Department of Economics at Harvard University, a man vastly experienced in labor negotiation procedures, testified at the trial:

> "The facts of life are that the parties really don't have much opportunity for divorce * * * and they are going to have to work out an agreement before a strike, or after a strike * * *."[33]

This being the reality of industrial life, it cannot be said by a court that as a matter of law the IP overstepped his authority or ignored or breached his obligation to the Local by pressing for such a Council clause.

Without actually deciding the question, the District Judge made known his belief that an "evergreen" clause, making the issue of termination justicible before the Council, would be illegal. He chose, however, to rest his decision on the ground that, aside from the questions that were debated concerning the "yellow sheet" clause, the IP's conduct was an attempt to usurp the Local's role in collective bargaining. This court is of the opinion that even assuming that an "evergreen" clause would be unilaterally terminable under § 8(d) of the LMRA, 29 U.S.C.A. § 158(d),[34] it was still within the right of the

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33. See also, Chamberlain, "Collective Bargaining and the Concept of Contracts," 48 Colum. L. Rev. 829 (1948); Kotin, "Labor Agreements in Collective Bargaining," 6 N.Y.U. Ann. Conf. Lab. 1, 5-6 (1953); Summers "Judicial Review of Labor Arbitration or Alice Through the Looking Glass," 2 Buffalo L. Rev. 1, 14-15 (1952); Goldberg, "Labor Arbitration—A Symposium: Introduction," 37 N.Y.U.L.Rev. 359-61 (1962).

34. See *Boeing Airplane Co. v. NLRB*, 174 F.2d 988, 991 (D.C. Cir. 1949); *Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge 751, IAM*, 91 F. Supp. 596, 603 (W.D. Wash. 1950), *aff'd per curiam*, 188 F.2d 356 (9th Cir.),

IP to insist, as a matter of policy within the union organization, that such a clause be accepted. Even if we assume the correctness of the District Court's obitur dictum that the "yellow sheet" clause was illegal, in the sense that it was unenforceable, it was certainly not so evil or contra bona mores as to vitiate the IP's constitutional powers to control collective bargaining.

It has been argued, however, that the "evergreen" clause is defective, perhaps illegal, as a divestiture of the statutorily protected power of the union to strike. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties," the Supreme Court has said, "is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960). But it is not the purpose of the law to impose a straight jacket on the format of collective bargaining or to *require* that the parties always maintain economic force as an alternative. The Court has in fact recognized that economic weapons may be relinquished, at least for a time, and particularly in exchange for an agreement to settle disputes by arbitration, see *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957); *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104-06 (1962),[35] which is

cert. denied, 342 U.S. 821 (1951); *cf., Boston Printing Pressmen's Union v. Potter Press*, 141 F. Supp. 553 (D. Mass. 1956), *aff'd.* 241 F.2d 787 (1st Cir.), *cert. denied*, 355 U.S. 817 (1957); *Couch v. Prescolite Mfg. Corp.*, 191 F. Supp. 737 (W.D. Ark. 1961); *In re Valencia Baxt Express, Inc.*, 199 F. Supp. 103 (D.P.R. 1961); *but cf., Division 892 v. M.K. & O. Transit Lines*, 210 F. Supp. 351 (N.D. Okla. 1962). (Holding, although a contract had been terminated arbitration could still be demanded in respect to the terms of the new contract).

35. There the Court stated that "the basic policy of national labor legislation [is]" to promote the arbitral process as a substitute for economic warfare." *Id.* at 105.

the touchstone of the practice of peaceful industrial self-government. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-82 (1960). Submission to the Council is not classical arbitration, but resembles it sufficiently to fall within the ambit of this policy.

Even if a union cannot be compelled to relinquish economic weapons perpetually, there is nothing in the law to suggest that it may not voluntarily forebear from the use of force as long as it chooses to do so. At most, the International can be said to have attempted to compel one of its component bodies to do this. It is not for the courts to say that a superior union body cannot require its subordinate to look to high level bargaining rather than to the use of economic force.

Actually, adoption of the more stringent Council clause would not surrender the strike weapon irretrievably; it would merely fortify the provision in the Constitution vesting control over this weapon in the International. It would remain within the power of the International to restore the strike weapon to a local. The District Court found that "[t]he IP had given his consent to a number of strikes where a Council clause appeared in the contract * * *." 203 F. Supp. at 302 n.26. Apparently this was done without disturbing the Council machinery. Moreover, the International could work within the Council for the termination of an "evergreen" agreement. The point is that while the IP can be said to have attempted to compel the Local to forebear from resorting to the strike, the IBEW its . did not surrender the strike instrument. It is not for the court to say that the International could not put this restraint on its Local.

It should be emphasized that we are not called upon to determine whether and under what circumstances a perpetual agreement between a labor organization and an employer may or may not be enforceable. What is before us is an internal union agreement vesting extensive powers in an international body—including the power to veto the use of the strike weapon by its local unions. If this International insists that its locals shall complete the collective bargaining process before the Council, composed equally of representatives of the International Union and of the Employer Association, such insistence is certainly not illegal. Nor does it become illegal if the International seeks to enhance the stability of this system by requiring that not only proposed alterations in the collective bargaining agreement but its termination as well shall be a justicible issue before the Council. The impact of the court's decision in this case is to impose a method of collective bargaining different from that contemplated in the Union Constitution, long and satisfactorily used by employer and employees. This it cannot do.

Earlier Suits

The final purportedly improper ingredient in the "mixed motives" was that, as the court found, the IP was partly influenced to revoke Local 28's charter because suits had been brought challenging the authority of the IBEW, without first exhausting available internal remedies. As the basis for this finding the court cites the fact that the IP had "stated publicly that he 'hated' the Landrum-Griffin Act because it protected access to the courts by union members." 203 F. Supp. at 302, 304. This finding would appear to relate to an address made by the IP before the 60th Convention of NECA in October, 1961—two months after the revocation order.

There were in fact three suits filed prior to 1961—on December 11, 1959, March 22, 1960, and apparently in April, 1960. The last two were dismissed on November 9 and December 20, 1960, and the District Court found that "[f]rom August 1960 until March 1961 the relations between Local 28 and the International officers were apparently friendly." 203 F. Supp. at 299. The unauthorized strike did not occur until the middle of June, 1961, and the Local's charter was revoked by an order dated August 1, 1961.

Accepting this finding of some relation between the earlier suits and the IP's actions, we think it may not be given controlling significance over the array of valid and legitimate motives shown and the court's unequivocal finding absolving the IP from "express or particular malice, i.e. ill-will, spite, a grudge, or a desire to be revenged on a particular person or persons, resulting in a deliberate intention to commit an injury." 203 F. Supp. at 309.[36] It would be a distortion of the record to elevate this factor to a position of pre-eminence, blotting out the permissible reasons for revocation of the charter.[37]

This court recognizes that should it be demonstrated in an appropriate case that the *basic* reason for union discipline was that the plaintiff had resorted to a court of law to

36. This opinion has already demonstrated that other assailed elements of the "mixed motives," found by the District Court, were neither in fact nor law improper.

37. Compare the instant case with, e.g., *Nelson v. Brotherhood of Painters, Local 386*, 47 L.R.R.M. 2441, 41 L.C. par. 16,755 (D. Minn. 1961); *Moore v. Moreschi*, 179 Misc. 475, 39 N.Y.S.2d 208, *aff'd without opinion*, 265 App. Div. 989, 40 N.Y.S.2d 334, *aff'd with minor modifications*, 291 N.Y. 81, 50 N.E.2d 552, *modified according to mandate*, 182 Misc. 264, 44 N.Y.S.2d 402 (1943).

secure his rights and that other reasons were mere shams, such discipline would most likely be invalid both as a breach of fiduciary obligation and because it is prohibited under §§ 609 and 101(a)(4) of the LMRDA, 29 U.S.C.A. §§ 529 and 411(a)(4).[38] But such a case would be different from the present one. That the reasons given by the IP for the revocation here are not shams is amply established by the District Court's reservation of the International's right to retry the leaders of Local 28.

Fair Hearing

The common law clearly requires that, to be valid, expulsion of a member or a subordinate body must be rendered after a "fair hearing." See, e.g., Cox, "Internal Affairs of Unions Under the Labor Reform Act of 1959," 58 Mich. L. Rev. 819, 835-36 (1960).[39] The elements of such a "fair hearing" often resemble constitutional due process requirements and generally encompass full notice and a reasonable opportunity to be heard—including the right to present evidence and the right to confront and cross-examine witnesses.[40] There is also a body of law

38. See *Sheridan v. United Bhd. of Carpenters*, 191 F. Supp. 347, 351-52, 194 F. Supp. 664 (D. Del. 1961), *rev'd on other grounds*, 306 F.2d 152 (3d Cir. 1962).

39. We reject the suggestion of the defendant that since under the Constitution the Local agrees that its charter may be revoked without a hearing, the hearing given by the IP may be beyond challenge. At common law, and now under the LMRDA, the requirement of a fair hearing exists regardless of whether the Union Constitution provides that sanctions may be imposed without any hearing. See, Annotation, 21 A.L.R.2d 1397, 1410-13 (1952); § 101(a)(5) of the LMRDA, 29 U.S.C.A. § 411(a)(5).

40. See, e.g., Summers, "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 200-06 (1960); Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 616 (1959).

requiring trial of an accused before an unbiased tribunal.[41] Some commentators seem to think that the courts should play a more active role in reviewing not only specific bias, e.g., pre-judgment or use of discipline pretextuously, but also built-in bias, e.g., combined prosecuting and judicial functions and use of "yes men." They have, however, generally recognized either that the courts have not been empowered to do this or that they are unable to reach such bias for it "is an inevitable product of the procedure itself."[42]

The District Court, without passing on the question of whether the IP had the authority to decide this case, held "it was one which he should have referred to the IEC or some other impartial tribunal * * *, [as] the propriety of his own action and his own good faith and motives in refusing consent to the strike and in preparing, filing and pressing the charges were being called into question." 203 F. Supp. at 307. This supposed defect was held not to have been cured by review by the IEC. Although the court found that the IEC was not prejudiced, it held that the review was in the nature of an appeal, not a trial *de novo*. We do not agree that, on the facts in this case as established in the court's findings, there was a procedural defect in the trial before the IP justifying a court of law to interfere with and to overturn the action taken.

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41. See *Ibid;* Summers, "The Law of Union Discipline? What the Courts Do in Fact," 70 Yale L.J. 175, 204-05 (1960); Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1082-83 (1951); Annotation, 21 A.L.R.2d 1397, 1425-28 (1952).

42. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1083 (1951); see Summers, "American Legislation for Union Democracy," 25 Modern L. Rev. 273, 288-89 (1962); Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 851, 873-75 (1960); Wollett & Lampman, "The Law of Union Factionalism—The Case of the Sailors," 4 Stan. L. Rev. 177, 213 (1952); Note, 48 Va. L. Rev. 78, 90 (1962).

In the first place, the IP was clearly empowered, by the International Constitution, to decide the issues involved in the revocation proceedings and to revoke the Local's charter. The IP is empowered, as we have seen, "[t]o decide all questions of law, disputes or questions in controversy however arising, all his decisions being subject to appeal, first to the I.E.C. and then the I.C. * * *." He is also specifically authorized "[e]ither to suspend or revoke the charter of any L.U., or have the I.S. reject the per capita tax from any L.U. that fails or refuses to observe the laws and rules of the I.B.E.W." (Art. IV, § 3(2), (8)). And it is provided, in addition, that nothing in the Constitution shall be construed to conflict with any provision of Article IV, enumerating the powers of the IP. (Art. IV, § 5).

The real basis for the argument that the IP was biased is that he was, in a sense, both prosecutor and judge. It is quite true that he ordered the charges to be brought and conferred with the International's General Counsel in their formulation as well as in the preparation of the revocation order. But it is also true that the basis for the charges was that the Local had struck in defiance of his repeated admonitions and had rejected his collective bargaining orders. And there can be no doubt that the Constitution vested in the IP these combined prosecuting and judicial functions.[42]

Although the charge was defiance of the orders that the IP had issued, his actions in issuing the orders and in

42. It should be noted, however, that the initial factual inquiry was made, not by the IP, but by a referee found by the District Judge to be "fair and impartial." 203 F. Supp. at 307.

their vindication were official not personal. If we are to give effect to the District Court's finding exonerating the IP of "express or particular malice, i.e. ill-will," etc. (see 203 F. Supp. 309), it cannot be said that in ordering charges to be brought he was acting to vindicate a personal affront rather than the interest of the Union.

It may well be thought desirable for unions to adopt hearing procedures that keep trial functions separate, but the federal courts are not empowered so to restructure the disciplinary procedures of unions. *Cf.*, Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1083 (1951) (implied). Some unions, like the United Automobile Workers, have responded to the pressure for fairness in internal trial proceedings by establishing, essentially external to the union organization, independent public review boards having the final word in disciplinary matters.[43] Such unions would appear to have gone far to separate prosecuting and ultimate judicial functions. But, in the absence of a clear congressional authorization, it is not for the federal courts to compel such measures.[44] This is, in effect, what the District Court's decision has done.

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43. See Brooks, "Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline," 22 Ohio St. L. Rev. 64 (1961); Oberer, "Voluntary Impartial Review of Labor: Some Reflections," 58 Mich. L. Rev. 55 (1959); Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 851, 874 (1960).

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44. Professor Summers reports that Senator McClellan's proposal to require that impartial arbitrators determine disciplinary matters was deleted from the final draft of the LMRDA. Summers, "American Legislation for Union Democracy," 25 Modern L. Rev. 273, 289 (1962). Compare § 101(a)(6) of the McClellan Amendment, 105 Daily Cong. Rec. 5810 (April 22, 1959), Legis. Hist. of the LMRDA, Vol. II, p. 1102, with § 101(a)(5) of the LMRDA, 29 U.S.C.A. § 411(a)(5).

Separation of functions is not an absolute due process prerequisite to fairness in administrative proceedings, see 2 Davis, *Administrative Law Treatise* § 13.02; in internal union proceedings it traditionally, and under the LMRDA, has also not been deemed a requirement of fairness.[45] Courts, federal courts especially, are justified in ruling a union tribunal biased only upon a demonstration that it has been substantially actuated by improper motives—in other words, only upon a showing of specific prejudice. This element has been found absent from the present case.

Severity of the Sanction

The District Court showed a commendable concern to protect those members of Local 28 who refused to join Local 24 against hardship resulting from the charter revocation—a concern which carried over in favor of the Local itself, though not its leaders. However attractive the court's solution may appear, we find no basis or authority for the court to compel this distinction to be made between leaders and rank and file. Moreover, in the circumstances of this case there would seem to be no justification for permitting a retrial of the officers and leaders, but before another tribunal, and setting aside the action against the Local and proscribing any retrial of it or further proceedings based upon this offense.

The general membership cannot on this record be cast in the role of blameless victims. If they were for a time misled by their local leaders as to the IP's refusal to

45. See, e.g., Summers, "American Legislation for Union Democracy," 25 Modern L. Rev. 273, 288-89 (1962); Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 851, 874 (1960).

authorize or approve the strike, it is undisputed that when they later learned the truth they supported these leaders willingly enough in flouting the International. This they did in disregard of the District Judge's clear caution given May 11, 1961, in open court in the presence of several hundred members[46] and despite three personal letters from the IP sent to each member. Upon the facts found we cannot say that for their sake the sanction imposed upon the Local must be nullified. The immediate result might be an amelioration for these members; in the long view such a judicial directive, even if permissible, could break down their most effective organizational agency. At all events, a court is not empowered to grant the dispensation in this case.

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46. "(The Court) Have you considered the fact that if you do go on strike or if you do refuse to go ahead with this policy which the International has set up and which all of the other local unions go along with and strike the International would very likely revoke your charter with whatever loss there is.

"It would seem to me that they have either got to end this whole agreement with these people or revoke your charter, one or the other.

"You are running an awfully close risk, and if you people understand that you are running that risk if you go on strike and if you terminate the agreement without going through with this plan, what has certainly up to this point been clearly demonstrated unless there is evidence to the contrary that this is the plan and policy of the International Union and that it has worked out to the satisfaction of the Union as a whole as well as to the employers as a whole over the years.

"And you people yourselves have taken advantage of the arbitration provisions within the last three years. So that it is a matter which has been gone ahead with.

"Now, at the present time I am very much inclined to think that you have a right to terminate, but once you terminate, I think you then can't expect to come to the Court and ask for protection against the International, if you terminate and strike.

"(Mr. O'Doherty) Yes.

"(The Court) Then you have great risks and you ought to do it with your eyes open. I am not saying what the legal effect is, but it may be severe."

III. *JURISDICTIONAL QUESTIONS*

In addition to the defenses on the merits, the defendant interposes a series of defenses on jurisdictional grounds. We have deemed it better to defer the discussion of these questions till now, when the reader has been made familiar with the factual background.

Labor Management Relations Act § 301(a)

As the basis for district court jurisdiction, Local 28 relies upon § 301(a) of the LMRA, 29 U.S.C.A. § 158(a), which provides:

> "*Suits for violation of contracts* between employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, *or between any such labor organizations,* may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (Emphasis added.)

Concluding that the Local's suit was based upon violations of a "contract" (the International Constitution) between "labor organizations" (Local 28 and the IBEW) as both terms are used in section 301(a), the District Court held it had jurisdiction under that provision. Although the issue is by no means free from doubt, we are inclined to agree.

The Supreme Court has only recently focused its attention on the "between any such labor organizations" clause. In *Retail Clerks International Ass'n v. Lion Dry Goods,*

Inc., 369 U.S. 17 (1962), it concluded that the word "contracts" as used in section 301(a) was not limited to collective bargaining agreements but was broad enough to comprehend strike settlement agreements. In reaching this result the Court reasoned that the term "contracts" had to be broader than collective bargaining agreements, otherwise the "between any such labor organizations" clause would have been surplusage—which it was not—for a collective bargaining agreement between a union as an employer and another union as representative of employees would be a contract "between an employer and a labor organization." 369 U.S. at 26-27. So saying, the Court cited with favor *United Textile Workers v. Textile Workers Union*, 258 F.2d 743 (7th Cir. 1958), a case in which the Court of Appeals affirmed enforcement, under section 301(a), of an AFL-CIO sponsored no-raiding agreement between two international unions.

Although it is now clear that at least some "contracts," not collective bargaining agreements, between at least some types of "labor organizations" are enforceable under section 301(a), the Supreme Court has not yet addressed itself to the particular questions which concern us here, namely, (1) whether an international's constitution is a "contract" within the meaning of section 301(a) and (2) whether a local union and its international parent are "labor organizations" within the meaning of that section.

There is almost no congressional history pertaining to the "between any such labor organizations" clause. This clause was inserted in section 301(a) in conference only shortly before the bill's passage, and there is nothing to indicate what Congress specifically intended by its inclusion. Plausible arguments have been made that the clause

should be interpreted as granting jurisdiction only over suits for violations of contracts that, like the AFL-CIO no-raiding agreements, have been freely negotiated between wholly autonomous or separate labor organizations.[47] This interpretation, opposing jurisdiction in suits like that of Local 28, is fundamentally grounded in the belief that Congress did not intend federal courts to become entangled in controversies within what is really a single union organization, and that it would be inappropriate for them to act in this area.[48]

Congressional history relating to provisions of the 1947 LMRA, other than section 301(a), tends to negative a congressional purpose to effect extensive and detailed statutory regulation of internal union affairs.[49] This history

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47. See Meltzer, "The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II," 59 Colum. L. Rev. 269, 297 n.287 (1959); Note, "Applying the 'Contracts Between Labor Organizations' Clause of Taft-Hartley Section 301: A Plea for Restraint," 69 Yale L. J. 299 (1959).

48. See *Sun Shipbuilding & Dry-Dock Co. v. Industrial Union of Marine Workers*, 95 F. Supp. 50 (E.D. Pa. 1950); *Local 33, International Hod Carriers v. Mason Tenders District Council*, 186 F. Supp. 737 (S.D.N.Y. 1960), *aff'd on other grounds*, 291 F.2d 496 (2d Cir. 1961); *cf., Snoots v. Vejlupek*, 87 F. Supp. 503 (N.D. Ohio 1949); *Kriss v. White*, 87 F. Supp. 734 (S.D.N.Y. 1949).

Courts have also been concerned with possible conflicts between a broad interpretation of the "between any such labor organizations" clause and the Norris-LaGuardia and National Labor Relations Acts. See *Local 33, International Hod Carriers v. Mason Tenders District Council*, 186 F. Supp. 737 (S.D.N.Y. 1960), *aff'd on other grounds*, 291 F.2d 496, 505 (2d Cir. 1961) (Friendly, J. concurring specially); *International Union of Doll Workers v. Metal Polishers International Union*, 180 F. Supp. 280 (S.D. Cal. 1960). See also, Note, 59 Colum. L. Rev. 202 (1959). The problems of accommodating the several labor statutes will be considered later.

49. Provisions regulating in detail certain aspects of internal union affairs, by declaring some acts to be unfair labor practices (thereby remediable by the Labor Board), were deleted in the House-Senate Conference. See House Rep. No. 510 on H.R. 3020, p. 46, in 1 Legis. Hist. LMRA at 550; 93 Cong. Rec. 6859 (June 12, 1947), 2 Legis. Hist. LMRA at 1623 (Senator Taft, Supplementary Analysis of the Labor Bill as Passed, discussing § 8(b)(5));

may only indicate that Congress did not mean at the time to regulate by detailed substantive legislation enforceable by the Labor Board the relations between individual members and unions. Such a congressional purpose is not necessarily inconsistent with a vesting in the federal district courts of jurisdiction to enforce contractual obligations agreed upon by an international and its locals.

The most that can be said with certainty is that Congress did not anticipate the problem. Looking to expressions of congressional purpose in regard to other provisions of the Act, it is possible to infer that had Congress considered the problem it would have limited section 301(a) jurisdiction so that federal courts would not thereby be in a position to settle such internal disputes. It is also possible, however, to conclude that Congress would have deemed it appropriate for federal courts to exercise jurisdiction over such disputes because, as the present one, they have traumatic industrial and economic repercussions. See

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Compare §§ 7 & 8, 29 U.S.C.A. §§ 157 & 158, *with* H.R. 3020, 80th Cong. 1st Sess., §§ 7(b) & 8(c), in 1 Legis. Hist. LMRA at 49-50, 52-56; see also, 93 Cong. Rec. 6443 (June 5, 1947), 2 Legis. Hist. LMRA at 1540 (Senator Taft on § 8(b)(5)); 93 Cong. Rec. 6503 (June 6, 1947), 2 Legis. Hist. LMRA at 1579 (Senator Murray, summary of differences between conference agreement and bill passed by Senate, discussing § 8(b)(5)).

In addition, to assure that § 8(b)(1)(A) of LMRA, 29 U.S.C.A. § 158(b)(1)(A), did not interfere with union membership policy, the proviso was added that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." See 93 Cong. Rec. 4271-73 (April 30, 1947), 2 Legis. Hist. LMRA at 1139-43 (debate on proviso); *cf.*, e.g., 93 Cong. Rec. 4197 (April 29, 1947), 2 Legis. Hist. of LMRA at 1097 (Senator Taft discussing what is now § 8(a)(3)).

It should be noted that in 1959, with the passage of LMRDA, 29 U.S.C.A. § 401 *et seq.*, Congress did undertake extensive and detailed statutory regulation of certain aspects of internal union affairs and organization.

§ 1(b) of the LMRA, 29 U.S.C.A. § 141(b).[50] Moreover in interpreting the "between an employer and a labor organization" clause, the Supreme Court has consistently favored the broad view of section 301(a) jurisdiction.[51]

In the absence of a clear expression of congressional intention to the contrary, we consider it permissible to adopt the more literal interpretation of the "between any such labor organizations" clause—the interpretation that would support jurisdiction in this case.[52]

A local union is a "labor organization" within the defi-

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50. It has been suggested that a holding of jurisdiction under § 301(a) would tend to promote at least two congressional policies. (1) A major purpose of § 301(a) is to overcome state law jurisdictional difficulties and thereby make unions amenable to suits as entities and to subject their funds to judgments for violations of contracts. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 511-13 (1962). Section 301(a) jurisdiction in cases like Local 28's would make this responsibility more effective. (2) In 1959, with the passage of the Labor Management Relations and Disclosure Act, 29 U.S.C.A. § 401, *et. seq.*, Congress undertook extensive and detailed statutory regulation of certain aspects of internal union affairs. It is suggested that even assuming the LMRDA and § 301(a) may not be construed *in pari materia*, it would serve congressional policy to construe § 301(a) broadly, thereby making a whole remedy available in a federal court when the same conduct inflicts injury, adjudicable under LMRDA, upon individual members and also injury, not adjudicable under LMRDA, upon local unions.

51. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Retail Clerks International Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962); *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

52. See *Local 33, International Hod Carriers v. Mason Tenders District Council*, 291 F.2d 496 (2d Cir. 1961); *Local 2608, Lumber Workers, United Brotherhood of Carpenters v. Millmen's Local 1495, United Brotherhood of Carpenters*, 169 F. Supp. 765 (N.D. Cal. 1958); see also, *Burlesque Artists Ass'n v. American Guild of Variety Artists*, 187 F. Supp. 393 (S.D.N.Y. 1958); Anderson, "Landrum-Griffin and the Trusteeship Imbroglio," 72 Yale L.J. 1460, 1485-87 n.150 (1962).

nition of § 2(5) of the NLRA, 29 U.S.C.A. § 152(5).[53] In addition, "contract" as used in section 301(a) should be taken to include union constitutions. The Supreme Court itself has recognized that under state law this is the generally accepted characterization of union constitutions.[54]

As we think our discussion of the merits makes clear, this court fully recognizes its weighty obligation not to expand this initial grant of jurisdiction into a carte blanche for unrestrained judicial inventiveness in the areas of union structure and collective bargaining policy. The federal courts, in exercising jurisdiction under this clause of section 301(a), are basically restricted to effectuating existing congressional policy. *Cf., Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957). Our disagreement with the decision under review is not on the question of section 301(a) jurisdiction to entertain actions for alleged breaches of inter-union contracts; but we take the view that Congress has not adopted the substantive policies upon which the court's decision on the merits was predicated. It does not lie within a federal court's power or discretion to remake the contract by introducing even salutary provisions not legislatively prescribed or necessarily implied.

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53. See *NLRB v. Indiana & Mich. Elec. Co.*, 124 F.2d 507 (6th Cir. 1941), *aff'd*, 318 U.S. 9 (1943); *cf. NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951).

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54. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 618-19 (1958); see also, *Cleveland Orchestra Committee v. Cleveland Federation of Musicians*, 303 F.2d 229, 230 (6th Cir. 1962); *Rosen v. District Council No. 9*, 198 F. Supp. 46, 47 (S.D.N.Y. 1961).

Jurisdiction to Issue an Injunction in Suit of Local 28—Effect of the Norris-LaGuardia Act

The defendant next argues that even if initially there is jurisdiction under § 301(a) of the LMRA over Local 28's suit, the Norris-LaGuardia Act, 29 U.S.C.A. § 101, *et seq.*, denies the District Court jurisdiction to issue an injunction in this dispute.[55] The District Court held that the case of the Local does not fall within the classes set forth in section 4, in which injunctions are absolutely prohibited, and that the case did not involve a "labor dispute" as used in section 7 and as defined in section 13(c). Acknowledging that the issue is debatable, we agree with the District Court's conclusion that, notwithstanding the Norris-LaGuardia Act, jurisdiction would exist in a proper case to issue a mandatory injunction.

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55. The relevant provisions of the Norris-LaGuardia Act include: Section 1, 29 U.S.C.A. § 101:

"No court of the United States * * * shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provision of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy expressed in this chapter."

Section 4, 29 U.S.C.A. § 104:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute *to prohibit* any person or persons participating or interested in such dispute (as these terms are herein defined) *from doing*, whether singly or in concert, any of the following acts: [Emphasis added]

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization * * *;

* * * * *

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

Although the Supreme Court has not yet addressed itself to the problem of accommodating the "between any such labor organizations" clause of § 301(a) of the LMRA and the Norris-LaGuardia Act, it has said enough to pro-

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"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified * * * ."

Section 7, 29 U.S.C.A. § 107, provides that an injunction will not lie in any case growing out of a "labor dispute" except after an adversary hearing where there is testimony in support of the allegations of the complaint to the effect—

(a) That unlawful and illegal acts have been threatened and will be carried out unless enjoined;

"(b) That substantial and irreparable injury to the complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Section 8, 29 U.S.C.A. § 108, provides that no injunction shall issue unless complainant has made every reasonable attempt to settle the dispute—including negotiation, government-sponsored mediation or voluntary arbitration.

Section 13, 29 U.S.C.A. § 113, contains definitions:

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have a direct or indirect interest therein; * * * or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; * * * or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

* * * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relationship of employer and employee."

vide useful guide lines for disposition of the issue as it arises in this case.[56]

In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), the Court first recognized the broad scope of federal court jurisdiction that Congress had granted under § 301(a) of the LMRA. Holding that an arbitration clause in a collective bargaining agreement was enforceable under section 301(a), the Court also held that, notwithstanding the prohibitions and requirements of the Norris-LaGuardia Act, a mandatory injunction would lie to compel arbitration. The Court pointed out that historically arbitration was not one of the acts, listed in Norris-LaGuardia § 4, in respect of which the power to enjoin had been abused,[57] and that in fact Congress indicated, in section 8 of the Norris-LaGuardia Act, its policy of favoring labor arbitration. It was held, moreover, that there was no policy justification "for restricting § 301(a) to

56. Preliminarily, it should be noted that the Act does not apply to all circumstances in which, on its face, it might be thought to apply. We know that injunctions have been upheld which were issued (1) to compel arbitration, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); (2) to enjoin a strike by a railway union over "minor disputes" cognizable by the Railroad Adjustment Board, see *Brotherhood of Railroad Trainmen v. Chicago River & Indiana RR*, 353 U.S. 30, 39-42 (1957); (3) to compel an employer to bargain with a certified union, *Virginian Ry. v. System Federation*, 300 U.S. 515, 562-63 (1937); and (4) to compel a union to perform its statutory duty of fair representation, *Graham v. Brotherhood of Railroad Firemen*, 338 U.S. 232, 237-40 (1949); *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955).

57. In the recent case of *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 212 (1962), the Court distinguished the situation involving an injunction directed *against* a strike, in violation of a no-strike clause, from *Lincoln Mills* on the grounds that in *Lincoln Mills* "—a mandatory injunction to carry out an agreement to arbitrate—did not enjoin any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of United States Courts."

damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements [of § 7] of that [Norris-LaGuardia] Act." 353 U.S. at 458.

The injunctive relief sought by Local 28—restoration of its charter, etc.—may also be said not to be "a part and parcel of the abuses against which the Act," as indicated by the specific matters listed in section 4, was directed. 353 U.S. at 458. Here, likewise, the injunction sought would not have the proximate effect of "*prohibit*[*ing*] any person or persons participating or interested in such dispute * * * *from doing* * * * any of the" acts listed in section 4. (29 U.S.C.A. § 104—emphasis added).

The crucial question remaining is whether the Local's case involved a "labor dispute" as defined in section 13(c) and used in section 7. If so, that section's procedural requirements precedent to the issuance of an injunction were not met in this case and the injunction should not have been granted. There is little doubt that at its root this controversy is concerned with a "labor dispute" as literally defined by section 13 of the Act. But this case is no more directly concerned with what is a "labor dispute" than was *Lincoln Mills*, yet there the Court held that:

> "Though a literal reading might bring the dispute within the terms of the Act [citation omitted], we see no justification for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act." 353 U.S. at 458.

See also, *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 212; *id.* at 219 (Justice Brennan's formulation to the same effect).

Of course, in its decision the Court also relied on its view that there is a clear congressional policy favoring enforcement of agreements to arbitrate grievance disputes. It cannot be said with complete confidence that there is similarly a clear congressional policy favoring federal court enforcement of inter-union contracts of the character at issue in the Local 28 case. But, if it is held (see pp. 54-59 *supra*) that Congress by section 301(a) did confer upon federal courts jurisdiction over such suits, it would be as inappropriate here as it would have been in *Lincoln Mills* to insist upon the stringent procedural requirements of section 7 when manifestly the matter here enjoined "was not a part and parcel of the abuses against which the Act was aimed." 353 U.S. at 458.

Pre-emption and Primary Jurisdiction Problems in the Local's Suit

The defendant further contends that the complaint of Local 28 involves matters arguably subject to § 7 or § 8 of the NLRA, 29 U.S.C.A. § 157 and 158, and is therefore, under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), subject to the Labor Board's exclusive primary jurisdiction. Although phases of the Local's case involve an alleged breach of the IBEW Constitution, defendant argues that the case is also arguably concerned with unfair labor practices. And because the same basic facts and contentions provide the foundation of both types of possible actions, the defendant argues that the

District Judge, despite his efforts, could not separate the various elements of the case.[58]

Recently the Supreme Court held that in cases under the "between an employer and a labor organization" clause of section 301 the pre-emption doctrine of *Garmon* is not relevant, regardless of whether the employer's conduct is arguably or concededly an unfair labor practice within the Labor Board's jurisdiction.[59] Since we have reached the conclusion that the District Court had jurisdiction over this suit under section 301(a), we think it not inappropriate to conclude further that the teaching of these decisions is applicable here.[60] *Cf., United Textile Workers v. Textile Workers Union*, 258 F.2d 743 (7th Cir. 1958); *Local 33, International Hod Carriers v. Mason Tenders District Council*, 291 F.2d 496, 502-05 (2d Cir. 1961).

58. The District Court held that it was not required wholly to yield to the jurisdiction of the Labor Board. Specifically the court held that it had no jurisdiction in Local 28's case "to decide whether the Maryland Chapter failed to bargain in good faith," 203 F. Supp. at 203, or whether the IBEW "conspired with and encouraged the Maryland Chapter not to bargain fairly," *id.* at 203, or whether "the International attempted to coerce the members of Local 28 in the exercise of the rights protected by sec. 7 . . . ." *Id.* at 203 n.11.

59. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); see *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962); *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962); see also *Textile Workers v. Arista Mills Co.*, 193 F.2d 529, 533 (4th Cir. 1951).

60. The recent Supreme Court decisions involved the "between an employer and a labor organization" clause; it is therefore necessary to review the policy considerations that justify applying the *Smith* rule to the "between any such labor organizations" clause of § 301(a).

First, it is clear that Congress did not mean to authorize the Labor Board to concern itself generally with matters of internal union discipline and structure. See n.49, *supra*; see also, e.g., *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958).

While it is very possible that some of the facts may be invoked as the basis for both types of controversies, this does not mean that the District Court in an appropriate case must yield the full measure of its jurisdiction and await the Board's determinations. At most, the court must merely avoid "affect[ing] the jurisdiction of the N.L.R.B. to remedy unfair labor practices as such."[61] The District Court did all that could be required of it by generally avoiding decisions tantamount to findings and conclusions as to whether or not unfair labor practices had been committed.

Parks: Cause of Action

As to the Parks case the International argues that it should have been dismissed for failure to state a claim entitling the plaintiffs to relief under §§ 101(a) and 609

Second, there can be no doubt that, just as the enforcement of collective bargaining agreements has been left to the courts, see *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962), most matters directly concerning internal union activities, insofar as they are regulated at all, have been left to the courts. See *Gonzales, supra*; *Bussey v. Plumbers Local No. 3*, 286 F.2d 165 (10th Cir. 1961); *Rekant v. Shochtay-Gasos Union, Local 446*, 205 F. Supp. 284, 291-92 (E.D. Pa. 1962); *Robertson v. Banana Handlers Local 1800*, 183 F. Supp. 423, 425-26 (E.D. Louisiana 1960); see also, *Highway Truck Drivers Local 107 v. Cohen*, 182 F. Supp. 608, 617 (E.D. Pa.), *aff'd per curiam*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) (implied).

61. *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962); *cf.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962).

In *Smith v. Evening News Ass'n*, 371 U.S. 195, 197-98 (1962), the Court stated that "[i]f • • • there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise."

of the LMRDA, 29 U.S.C.A. §§ 411(a) and 529.[62] To resolve this question it is necessary to determine whether the order of revocation "otherwise disciplined" the Local's members within the meaning of sections 101(a)(5)[63] and 609.[64] So far as we can determine, this question is one of first impression. The phrase, "otherwise disciplined," is not defined in the statute and a review of the legislative history has not revealed any particular meaning attached to it by Congress. Finally, there have been few decisions construing this phrase,[65] except as it may relate to the

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62. This, of course, is not strictly a jurisdictional challenge but rather an attack on the merits. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Jurisdiction over this cause is founded on § 102 of the LMRDA, 29 U.S.C.A. § 412, which provides that:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

Section 609, 29 U.S.C.A. § 529, provides that

"The provisions of section 412 of this title shall be applicable in enforcement of this section."

63. "No member of any labor organization may be fined, suspended, expelled, or *otherwise disciplined* except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." (Emphasis added.)

64. "It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or *otherwise discipline* any of its members for exercising any right to which he is entitled under the provisions of this chapter. * * *" (Emphasis added.)

65. Cases in which it was held that the plaintiffs were "otherwise disciplined": *Detroy v. American Guild of Variety Artists*, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961), *reversing on other grounds*, 189 F. Supp. 573 (S.D.N.Y. 1960); *Rekant v. Shochtay-Gasos Union*, 194 F. Supp. 187 (E.D. Pa. 1961); 205 F. Supp. 284, 289 (E.D. Pa. 1962); *Duluhery v. Marine Cooks Union*, 199 F. Supp. 270, 273 (S.D. Cal. 1961); *Gross v. Kennedy*, 183 F. Supp. 750, 755-56 (S.D.N.Y. 1960).

Cases in which it was held that the plaintiffs were not "otherwise disciplined": *Seeley v. Brotherhood of Painters*, 308 F.2d 52, 58-60 (5th Cir.

removal of officers.[66]

We are disposed to the view that the plaintiffs have stated claims under the Act. While it is true that the revocation order directly affects only Local 28, not the individual plaintiffs, it would seem unduly technical to say that if the revocation were invalid and indirectly resulted in injury to these individuals, they may not be heard to complain under the LMRDA. On this point there are some helpful precedents in the state courts. At common law, examining the practical effect of revocation or suspension of a local's charter, they appear to have taken the position that such action disciplines the local's members.[67] And, in the absence of a clear congressional purpose to the contrary, in construing the Labor Reform Statute we cannot disregard the practical impact of this revocation on the individual members.

In the present case, the IP's order does affect the individuals in their status as members of the union.[68] That is,

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1962); *Allen v. Armored Car Chauffeurs Local 820*, 185 F. Supp. 492 (D.N.J. 1960).

66. See, e.g., *Sheridan v. United Brotherhood of Carpenters*, 191 F. Supp. 347, 352-53, 194 F. Supp. 664, 668 (D. Del. 1961), *reversed*, 306 F.2d 152, 156-57 (3d Cir. 1962) (only Kalodner, J. for reversing on this ground); *Mamula v. Local 1211, United Steelworkers*, 202 F. Supp. 348 (W.D. Pa. 1962).

67. See *Moore v. Moreschi*, 179 Misc. 475, 485, 39 N.Y.S. 2d 208, 216, *aff'd without opinion*, 265 App. Div. 989, 40 N.Y.S.2d 334, *aff'd with modifications as to scope of injunction*, 291 N.Y. 81, 50 N.E.2d 552, *modified according to mandate*, 182 Misc. 264, 44 N.Y.S.2d 402 (1943); see also *Washington Local Lodge No. 104 v. International Brotherhood of Boilermakers*, 33 Wash.2d 1, 68-71, 74-75, 203 P.2d 1019, 1058-59, 1061 (1949); *Hatch v. Grand Lodge Brotherhood of Railroad Trainmen*, 233 Ill. App. 495 (1924); *Gardner v. Newbert*, 74 Ind. App. 183, 128 N.E. 704 (1920).

68. This is undoubtedly a factor for consideration in determining whether challenged action constitutes "other discipline." See, e.g., *Seeley v. Brotherhood of Painters*, 308 F.2d 52, 58-60 (5th Cir. 1962).

although there is some uncertainty as to how the members' rights in the various local and international pension and welfare funds will be affected, there can be little doubt that the revocation order does touch these rights. In addition, as a proximate result of the International's action, members of Local 28 have suffered a loss of employment opportunities.[69]

In alleging that by revoking the Local's charter the IP "suspended, expelled, or otherwise disciplined" the members without a full and fair hearing, the plaintiffs stated a claim under section 101(a)(5).[70] They also made sufficient allegations to state a claim that by revoking the Local's charter the IP acted, in violation of section 609, to "suspend, expel, or otherwise discipline" the members for exercising rights to which they were entitled under the provisions of the LMRDA—specifically the right to bring suit guaranteed by section 101(a)(4). The plaintiffs' failure was in the proof of their claims.

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69. This is also a relevant factor. See *Detroy v. American Guild of Variety Artists, supra; Rekant v. Shochtay-Gasos Union, supra; Gross v. Kennedy, supra; but cf., Allen v. Armored Car Chauffeurs Local 820, supra.*

70. It would appear that, regarding this section, the District Court based its decision in part upon the conclusion that the hearing was unfair not only procedurally but also in that the IP had breached his fiduciary obligation and had imposed an unduly severe sanction—thus, the court has read substantive guarantees into the "fair hearing" requirement. See *Union Trusteeships: A Report to the Congress*, U.S. Dep't of Labor, BLMR (1962) 131; Anderson, "Landrum-Griffin and the Trusteeship Imbroglio," 71 Yale L.J. 1460, 1482 (1962). Having held, on the merits, that the IP neither breached his fiduciary obligation nor imposed an unduly severe sanction, this court will reserve judgment on the mooted question of whether § 101(a)(5) protects substantive or merely procedural rights.

Possible Conflict Between Parks Action and NLRB Jurisdiction

Another jurisdictional point advanced by the IBEW is that the District Court was required, even in the Parks action, which is based upon the Bill of Rights provisions (Title I) and § 609 of the LMRDA, to defer to the exclusive primary jurisdiction of the Labor Board, because at least elements of the case are arguably subject to § 7 or § 8 of the NLRA. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). The District Court was entirely correct in declaring this challenge to its jurisdiction "unavailing."

The LMRDA has created new federal rights to be enjoyed by union members.[71] These rights are to be enforced in the federal courts. See § 102 of the LMRDA, 29 U.S.C.A. § 412; *Detroy v. American Guild of Variety Artists, supra*. The fact that the Act preserves to union members all remedies "under any State or Federal law or before any court or other tribunal * * *," § 103 of the LMRDA, 29 U.S.C.A. § 413; see also § 603(a), 29 U.S.C.A. § 523(a), only means that the new federal protection was superimposed on protection already available in other forums, "reinforcing and not supplanting it." Summers, "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 176 (1960). This does not mean that the District Court must abstain from exercising its jurisdiction under section 102 when elements of the matter at issue are arguably subject to the Labor

71. See *Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 78 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961); *Rekant v. Shochtay-Gasos Union, Local 446*, 205 F. Supp. 284, 291-92 (E.D. Pa. 1962); *Roberts v. Banana Handlers, Local 1800*, 183 F. Supp. 423 (E.D. Louisiana 1960).

Board's jurisdiction.[72] Congress did not intend that before securing the rights it made enforceable in federal courts, individuals should wait for the Labor Board to pass upon such matters as might also be within its competence.[73]

Obviously, since § 102 of the LMRDA, 29 U.S.C.A. § 412, expressly provides that relief may include injunctions, the provisions of the Norris-LaGuardia Act are inapplicable.

Title III of the LMRDA—Trusteeships

The plaintiffs assert that by revoking and reissuing the charter conveying IBEW jurisdiction in the Baltimore area, the IP achieved the same objectives as he might have attained through a formal trusteeship and his action should therefore be held to have constituted the imposition of a trusteeship.[74] So denominating the IP's action, the plaintiffs reason that the trusteeship provisions of the LMRDA have been violated.[75]

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72. See *Rekant v. Shochtay-Gasos Union, Local 446*, 205 F. Supp. 284, 290-92 (E.D. Pa. 1962); *Robertson v. Banana Handlers, Local 1800*, 183 F. Supp. 423 (E.D. Louisiana, 1960); *cf., International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958); *Bussey v. Plumbers Local No. 3*, 286 F.2d 165 (10th Cir. 1961); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). And in our own circuit, *cf., Textile Workers v. Arista Mills Co.*, 193 F. 2d 529, 533 (4th Cir. 1951).

73. See *Robertson v. Banana Handlers, Local 1800, supra; cf., Rekant v. Shochtay-Gasos Union, Local 446, supra; International Association of Machinists v. Gonzales, supra; Bussey v. Plumbers Local No. 3, supra.*

74. Section 3(h) of the LMRDA defines a trusteeship as "any receivership, trusteeship or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws." 29 U.S.C.A. § 402(h).

75. Section 302, 29 U.S.C.A. § 462, limits the lawful reasons for which a trusteeship may be imposed. Section 304(c), 29 U.S.C.A. § 464(c), provides

Preliminarily, a question to be determined is whether the District Court was empowered to exercise jurisdiction over this private action for alleged violations of Title III of the LMRDA. The jurisdictional provision of Title III, § 304(a), 29 U.S.C.A. § 464(a), provides that:

> "Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this title (except section 461 of this title) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this subchapter (except section 461 of this title) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate."

Several district courts have interpreted this to mean that individual members or subordinate bodies may not bring a civil action until full resort has been had to the adminis-

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that a trusteeship will be presumed valid for a period of eighteen months only if "established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws * * *."

trative remedies available before the Secretary of Labor.[76] In a litigation involving Local 28 and the IBEW, prior but pertinent to the present one, District Judge R. Dorsey Watkins had occasion to pass upon this very question. After a scholarly analysis, he concluded that, at least until the Secretary of Labor does bring suit, a private action can be maintained under § 304(a) of the LMRDA. *Executive Board, Local 28 v. IBEW*, 184 F. Supp. 649, 653-59 (D. Md. 1960).[77] In this well reasoned view that section 304(a) does not require recourse to that particular administrative remedy and action of the Secretary before a private suit may be entertained, this court concurs.

Upon review of the evidence, however, Judge Thomsen concluded that while it is possible for revocation to be used as a means of evading the trusteeship provisions of Title III, it was not proven that revocation was so used.[78] Although the question is exceedingly close, see Anderson, "Landrum-Griffin and the Trusteeship Imbroglio," 71 Yale L. J. 1460, 1478-85 (1962), this court is not persuaded that the District Court's disposition of the trusteeship question should be overturned.

76. See *Flaherty v. McDonald*, 183 F. Supp. 300, 304-06 (S.D. Cal. 1960); *Flaherty v. United Steelworkers*, 46 L.R.R.M. 2483, 3006, 41 L.C. par. 16,517 (S.D. Cal. 1960); *Cox v. Hutcheson*, 204 F. Supp. 442, 446 (S.D. Ind. 1962); *Rizzo v. Ammond*, 182 F. Supp. 456, 471-72 (D.N.J. 1960).

77. *Accord, Vars v. International Bhd. of Boilermakers*, 204 F. Supp. 245, 246-47 (D. Conn. 1962); see *Palisades Lodge No. 173 v. Brotherhood of Railway Clerks*, 47 L.R.R.M. 2605, 41 L.C., par. 16,666 (S.D.N.Y. 1960) (by implication); see also, Anderson, "Landrum-Griffin and the Trusteeship Imbroglio," 71 Yale L.J. 1460, 1498-500 (1962). Note, 48 Va. L. Rev. 78, 96-97 (1962).

78. At least two commentators appear to agree that revocation and reissuance of a charter should, at least under some circumstances, be held to constitute the imposition of a trusteeship. See Horowitz, "Possible Effects of LMRDA's Provisions," in *Symposium on the Labor-Management Reporting and Disclosure Act of 1959* (1961), edited by Slovenko, 458, 563; Anderson, "Landrum-Griffin

Exhaustion of Internal Remedies—in Both Suits

The defendant maintains that both actions should have been dismissed because the plaintiffs failed to exhaust the reasonable internal remedies that were available to them. Having filed their suits over a year ago, both Local 28 and the individual plaintiffs failed to appeal to the International Convention which met this past September after the appeal in this case was argued. In addition, the individual plaintiffs in the Parks suit never did appeal to the IEC from the IP's revocation order.[79]

We think that the individual plaintiffs need not have been actual parties to the proceeding before the IEC. They were not themselves direct parties to the revocation order or proceedings and, since the two cases, Local 28's and Parks', are based upon a common foundation, Local 28's appeal to the IEC preserved the rights of the individuals who now challenge the revocation order.

Plaintiffs' failure to appeal to the Convention did not bar disposition of the cases by the District Court. Although there is a common law doctrine that parties are not entitled to judicial relief until they have exhausted

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and the Trusteeship Imbroglio," 71 Yale L. J. 1460, 1478-85 (1962). The Department of Labor adopted the position:

"that a revocation of a charter, properly conducted and in accordance with a labor organization's constitution and bylaws, does not create a trusteeship. * * * The Department has also determined that nothing in the Act prevents the creation of a new local, even though it may be composed primarily of the same individuals formerly belonging to the trusteed local that had its charter revoked." *Union Trusteeships: A Report to the Congress*, U.S. Dept. of Labor, BLMR (1962) 33-34.

79. In the earlier injunction proceeding brought by Local 28, Judge Thomsen denied relief since the Local had not pursued the available internal remedy before the IEC. *Local 28 v. IBEW*, 197 F. Supp. 99, 107-08 (D. Md. 1961).

intra-union remedies, there are a number of well-recognized exceptions "which have substantially qualified if not nullified the rule."[80] Exceptions are recognized when resort to the internal appeal would be unreasonably burdensome because of delay likely to result in irreparable injury.[81]

In addition to the common law doctrine, as qualified by its exceptions, there is now § 101(a)(4) of the LMRDA, 29 U.S.C.A. § 411(a)(4).[82] The Second Circuit has squarely held that the proviso in section 101(a)(4) is applicable as a limitation on jurisdiction in suits brought in the federal courts under section 102 for violations of Title I of the LMRDA. *Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 77-78 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961). Not only does section 101(a)(4) govern the exhaustion question in the Parks action, but since it provides an authoritative expression of congressional labor policy, it is, insofar as it may modify the common law exhaustion doctrine, a prime source upon which the court should draw in formulating the federal law in deciding the Local's case. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

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80. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1086 (1951); *accord, Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 79 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961); see also, Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 614-15 (1959).

81. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1086-92 (1951); Summers, "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L. J., 175, 207-10 (1960); Annotation, 168 A.L.R. 1462, 1468-82 (1947).

82. "No labor organization shall limit the right of any member thereof to institute an action in any court, or in proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are

The four-month limitation in the proviso has been subjected to various interpretations.[83] We agree, however, with the District Court's conclusion that "whatever construction is placed" on this proviso (230 F. Supp. at 296), these suits are barred neither by the statutory limitation nor by common law exhaustion doctrine. When these suits were brought, all internal remedies, available within four months of revocation, had been exhausted. To insist upon full exhaustion of remedies would be to impose an unreasonable delay in the adjudication of plaintiffs' rights and would result in irreparable harm to plaintiffs.[84]

CONCLUSION

Parent unions have played a useful role in bringing a measure of order and stability to the labor market. Perhaps their best contribution has been in restraining their component bodies from reckless resort to work-stoppages and strikes. If in some quarters abuses have arisen that require correction, there should be legislation. But courts should not step in and, in order to achieve immediate objectives thought to be desirable, establish a rule that locals may with impunity defy their parent unions and strike at will. By the judicial application of *ad hoc* standards, in

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named as defendants or respondents in such action or proceeding, * * * *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *."

83. E.g., *compare Detroy, supra, with Harris v. International Longshoremen's Ass'n, Local 1291*, 205 F. Supp. 45 (E.D. Pa. 1962).

84. See Summers, "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L. J. 175, 208 (1960); see also Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 614 (1959).

the pursuit of what is called democracy in union government, we will have succeeded only in introducing, not democracy, but chaos. This would not only tend to disintegrate the labor movement, but the irresponsibility thus generated could have serious implications for employers and others as well.

We conclude that while the consolidated cases are within the court's jurisdiction, there was no sufficient basis for holding that the IBEW or its IP breached a fiduciary obligation to Local 28 or its members, or that the hearing was lacking in fairness, or that revocation was an unduly severe sanction. The Local's claim based on breach of contract under the Taft-Hartley Act therefore fails and the charter revocation did not violate the members' rights under §§ 101(a) and 609 of the LMRDA, 29 U.S.C.A. §§ 411(a) and 609.

We are not unmindful that the interests of the members of Local 28 in the various local and international pension and benefit funds have been made uncertain by the revocation. Whether the International or the Local has title to the Local's funds and other assets was not litigated in these cases and we do not pass upon this.[85] We note, however, that the revocation order anticipated the International's taking steps to assure that the members of Local 28 will not suffer unnecessary loss of financial benefits. Moreover, there is no indication that the rank and file members of the outcast local will be unable to preserve their memberships in the IBEW by accepting the invitation extended them to join Local 24 or by transferring to some other local.

The District Court's decision must for the reasons stated be reversed, and the case is remanded for further orders consistent with this opinion.[86]

Reversed and remanded

SOPER, Circuit Judge, dissenting:

The power of the District Court to entertain these suits is clearly demonstrated in the concluding portion of the court's opinion, and with this conclusion I concur. However, the ultimate conclusion of the court, reversing the judgment of the District Court, involves an endorsement and approval of the conduct of Freeman, the all-powerful president of the IBEW, in trying and punishing Local 28 and its members, and with this conclusion I am obliged to dissent, since the behavior of the IP was plainly at variance with established principles of due process and fair play. The opinion embraces the theory that "basic union policy and structure" require that the dominant power be lodged in the parent body and pursues this theme so steadily in the course of an elaborate discussion that in the end little head is given to the arbitrary manner in which the IP exercised his power.

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85. Of possible interest in this connection are Cohn, "The International and the Local Union," 11 N.Y.U. Ann. Conf. Labor 7 (1958); Summers, "Union Schism in Perspective: Flexible Doctrines, Double Standards and Projected Answers," 45 Va. L. Rev. 261 (1959); Note, "Disposition of Union Assets on Disaffiliation," 45 Va. L. Rev. 244 (1959); Annotation, 23 A.L.R.2d 1209 (1952).

86. If this court should be in error in any of these conclusions, we are of the opinion that the order of the District Court still requires revision. While the revocation would be void, the International should, in that event, be given the opportunity to retry the Local before a properly constituted tribunal.

A brief resume of the conduct of the IP, based upon undisputed evidence, demonstrates to my mind that the District Court was correct in finding that the local union and its members were denied their fundamental rights. The IP was a stern and resolute individual, determined to have his own way not only when he was executing the powers conferred upon him by the constitution of the IBEW but also in those areas in which the local union members were entitled to some freedom of choice. His attitude toward anything that tended to diminish his power is shown by a public statement in a speech in 1961 at the convention of an association of electrical contractors known as NECA. He said that he "hated" the Landrum-Griffin Act. The fact that Congress itself deemed it necessary to formulate a bill of rights for the protection of the individual workers found no favor in his eyes. Accordingly, it is not surprising to learn that the Local had much provocation from the IP himself when it ventured to strike without his consent. The current labor dispute involved two major items—a demand of the workers for an increase in wages of 35 cents an hour in place of an increase of 2 cents an hour offered by NECA, and a determined stand by the Local in opposition to the insertion of a "council clause" which would strip the Local of its power to terminate a contract at the end of the year and lodged the power of decision in the CIR.* In this dispute the IP promised the Local his support, but in fact he worked in harmony with NECA. He tried hard to persuade the Local to adopt the obnoxious clause and also to accept a raise of 10 cents an hour recommended by the IEC although he

*The District Court held in an earlier suit brought by the Local against the Maryland Chapter of NECA, 194 F. Supp. 494, that the Local had the right to terminate the contract at the end of the year; no appeal was taken from the decision.

was aware that the Local had obtained contracts with a number of independent contractors entitling the workers to an increase in wages of 35 cents per hour. In order to break the strike the IP brought in workers from outside the State, and persuaded union men in other trades not to respect the Local's picket line. The IP was angry with the union because it would not do his bidding and it is obvious that instead of supporting the Local in the dispute he used his weight in support of the employing contractors.

It was in this attitude and under these circumstances that the IP came to judgment. He had the right under the IBEW constitution to institute charges against the Local for striking without his consent and also the right to sit in judgment in the case. He exercised both rights. He appointed a referee to hear the charges preliminarily but reserved to himself the final decision. He had to decide whether he should condemn the Local for striking without his consent and without his orders and what punishment, if any, he should inflict. He was not obliged to hear the case himself since, under the constitution of the International, it could have been referred to the IEC, a body of international officers appointed to govern the union between meetings of the international convention.* He knew that he had opposed the working employees and favored NECA in the negotiations that preceded the strike and that his own conduct was one of the matters that should be taken into consideration in deciding the case. Indeed, he was aware that he ought not to sit in the case, for he refused to submit to examination as a witness, saying that he could not be a witness because he had to make

*The appeal was taken in this case to the IEC but, as the District Judge pointed out in his opinion, the IEC did not try the case de novo but upon the record made up by the IP.

the ultimate decision in the case. Nevertheless, he did sit; and again he gave evidence that he was not bound by any rules of fair play, for during the trial he did not hesitate to confer with the prosecuting attorney out of the presence of the attorney for the local union.

In view of this narrative, it is futile to suggest, as does the opinion of the court, that "the real basis for the argument that the IP was biased is that he was, in a sense, both prosecutor and judge." The trier of the cause in an internal union dispute or in an administrative proceeding does not cease to be a judge because he is empowered also to act as prosecutor. He may not ignore the established principles of due process in order to obtain his own ends.

It is plain that the IP was not qualified to pass judgment in the case and, particularly, to determine the kind of punishment to be inflicted for violation of the union rules. This is shown not only by what is set forth above but also by the extremely severe punishment which he inflicted upon the local union and its members by revoking the Local's charter, as is shown in the opinion of the District Court. This was the only case in which the IP had refused his consent to a strike by a Local union when it desired to strike in order to maintain its position in a legitimate labor dispute. Not only did the IP withhold his consent to the strike in the instant case, but, when the strike took place against his will, he imposed the severest discipline within his power. Under all these circumstances it is improper to approve the actions of the IP especially in these days when the rights and constitutional safeguards of a person accused of crime and of a person convicted of crime are so meticulously observed. One would suppose that the same protection should be afforded a lawabiding working man even if, in the exercise of his rights of collective bar-

gaining, he exceeds the bounds of propriety. For these reasons and those expressed in the opinion of Judge Thomsen I dissent. See *Calabrese v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, et als.* (D.N.J. December 21, 1962)

LANDRUM-GRIFFIN ACT

§2, 29 U.S.C. §401 (Declaration of Findings, Purposes and Policy):

(a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety,

or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

* * * * * *

§101(a)(4), 29 U.S.C. §411(a)(4):

Protection of the Right To Sue. — No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

§101(b), 29 U.S.C. §411(b):

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

* * * * * *

§302, 29 U.S.C. §462 (Purposes for which a Trusteeship may be established):

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization

which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

* * * * * *

§501(a) 29 U.S.C. §501(a) (Fiduciary Responsibility of Officers of Labor Organization):

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

* * * * * *

N.L.R.A. (as amended) §8(d) 29 U.S.C. §158(d):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employ-

ment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss

or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Office-Supreme Court, U.S.
FILED
MAR 28 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 885

JOHN E. PARKS, JR. and ROBERT M. FOOTE and ALBERT McHUGH and PAUL ZIEGLER and SILVIO STAMERRO, Individually and as representatives of the Members of Local 28, IBEW, in a class action and LOCAL UNION 28, IBEW,

Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and LOCAL UNION NO. 24 (IBEW),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT IBEW'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent IBEW is "dissatisfied", under Rule 40, para. 3, with petitioners' statement of eleven "Questions Presented", and each of them,—all of them as to substance, and Questions numbered 1, 2, 3, 5 and 6 as to both substance and form, because these latter are loaded with erroneous factual assumptions. Respondent is dissatisfied particularly with the unsupported assumptions of evidentiary and ultimate facts (and of non-existent "findings of fact") chosen as the basis of these five, which are themselves involved fact Questions.

Petitioners lost their case purely on *the facts*[1] and be-

[1] Throughout the brief emphasis is supplied, except where otherwise noted.

cause of failure of their proof, and not on the law. The two lower Courts decided in petitioners' favor every question of jurisdiction (four such questions—listed as "Additional Questions" Nos. 8-11, inclusive, in the Petition) that was necessary to empower the Courts to give petitioners all the relief they requested, i.e. plenary relief (if they were entitled to any relief whatsoever on the facts).[2] The Courts permitted in evidence all of the evidence—"a great mass" —offered by the petitioners, all of respondent's objections to admissibility being overruled. (Jt. App. 14).[3] Furthermore, all the other principal and controlling questions of law in the case (including the availability and interpretation of all federal statutes invoked by petitioners) were also decided in favor of petitioners both by the Court of Appeals and the District Court.

The Court of Appeals, however, after months of careful consideration, drew, and reached in favor of respondent, the proper ultimate *factual conclusions* entitling respondent to a judgment when the law as to which both Courts were agreed was applied, i.e. the Court of Appeals recognized the ultimate facts which logically and inevitably flowed from the evidentiary facts which had been found by the District Court, all of which evidentiary fact findings the Court of Appeals first accepted.

There are no Questions that have been, or could be, presented by petitioners in this case of the character that might warrant the granting of the writ of certiorari *at the instance of petitioners*. See Rule 19. This is so primarily because (a) all important and controlling questions of law have been decided in petitioners' favor, and (b) all the other Questions Presented, however phrased, are questions of complex fact.

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[2] Both Courts concluded *on the facts* that there was no "trusteeship" involved in the revocation of petitioners' charter, and hence no jurisdiction under Sec. 304 of the Landrum-Griffin Act. But no relief could have been granted under that jurisdictional provision which could not have been granted petitioners under the jurisdiction which was assumed. Hence, Question Presented No. 4 seeks to raise questions of fact and law which are academic.

[3] As in the petition, reference in this brief to "Jt. App." is to the joint appendix and to "App." is to the appendix attached to the petition.

Yet petitioners directly invite this Court to re-examine a host of purely factual questions and then, in aid of this objective, also invite this Court, by their "Additional Questions," numbered 8-11, inclusive, to re-affirm the legal victories they have already won in the fields of federal jurisdiction and of the construction and applicability of federal statutes, and the like. These questions of jurisdiction and applicable law (all moot and purely academic now from the viewpoint of petitioners and of this Court) are presented by petitioners, certainly not to obtain their reversal, but solely as a device for obtaining permission to re-argue before this Court the numerous questions of evidentiary fact, and of ultimate factual conclusions, in this case, to which the lower Courts gave the most time-consuming and painstaking consideration.[4]

As illustrative of the factual Questions Presented that are clearly inaccurate and defective as to form, let us briefly examine here the form and content of petitioners' "Questions Presented No. 1."

Petitioners' Question 1 mentions Section 501(a) of the Landrum-Griffin Act, but it raises no legal question of that statute's interpretation or availability to petitioners. Instead Question 1 represents a jumbled package of 9 selected factual questions, the first 7 of which, as they are stated by petitioners, were not decided in petitioners' favor by either Court. They are:

(a) Was Local 28 "forced" to strike?

(No provocation for the strike emanating from IBEW was attempted to be proved or found.)

(b) Did the IP make a "secret deal with the employers"?

(This is an allusion to a so-called "tentative decision" of the Council on Industrial Relations, denied by respondent, but found by the District Court. It was "secret" only in the sense that all tentative deliberations of the Council in camera are always confidential, none of them being dis-

[4] Trial in the District Court consumed 22 days. The Court of Appeals held the case *sub curia* for over 6 months.

closed to anyone except the final action of the Council at the close of its sessions (App. 10, Jt. App. 23). It was not found by the District Court to have been a "deal," or even made known to the Baltimore "employers" (Jt. App. 23).)

(c) Was Local 28 "forced" to strike "because the IP . . . [made] a secret deal with the employers"?

(d) Did the IP make "a secret deal with the employers", "while professing his support of the local"?

(e) Did the IP profess "his support to the local in the local's collective bargaining" (i.e. the local's inflexible demand for an "unrealistic" 35-cent wage increase (Jt. App. 24, 25; App. 16) and for an "abrogation", not consented to, of its existing agreement (Jt. App. 38)), and, if so, what was the extent of the support so professed?

(The District Court merely found, "The Local reasonably felt that it had the support of the International in its efforts to obtain *a substantial increase* (Jt. App. 20). If this is true, (see App. 17), it is far from saying that the IBEW or the IP ever professed to support the Local in "shooting for the moon" for 35 cents (App. 18), in its "abrogation" of its collective bargaining agreement, "not sanctioned by the IP" (Jt. App. 38), or in spurning the services of the Council (App. 20, Jt. App. 26).)

(f) If the IP made a "secret deal with the employers", did it "destroy any chance of the Local to bargain a fair agreement"?

(This is again an allusion to the so-called "tentative decision" of the Council in its deliberations in May 1961. It suggested a 10-cent wage increase but required no "evergreen" Council clause (App. 20). It "destroyed" nothing, never being communicated to the Baltimore employers and being superseded by the Council itself two weeks later (App. 20). A month later the employers offered Local 28 double this amount (Jt. App. 538, 539, 930). This 20-cent increase was as great as that which Local 24 later obtained (Jt. App. 31).)

(g) Had the Local's leaders "successfully sued the International under Landrum-Griffin"?

(This is a distorted reference to an action brought in April 1960 to terminate a trusteeship of Local 28, which trusteeship obtained from February 1959 to August 1960, when the IP terminated it at the end of the 18-month period provided in Landrum-Griffin. The suit, with which the IP had no personal connection, was never tried, but was mooted and had no "success" or consequences whatever (App. 14).)

(h) If "one" of the IP's reasons for revoking Local 28's charter was a desire to punish the members of the local because of their leaders' "successful litigation", was it important in view of the other and more important reasons and grounds justifying the revocation?

(The District Court found a number of other most compelling reasons for the revocation. It found Local 28's unauthorized strike "a serious offense, justifying expulsion" (Jt. App. 36); "that the IP owed a duty to the union as a whole, and could not properly grant permission to one local to engage in a strike which he felt to be contrary to the best interests of the IBEW" (Jt. App. 38); that the IP acted "to maintain *necessary* union discipline" (App. 34); and that the IP was not motivated by "ill will" or "express or particular malice" (Jt. App. 38).)

(i) Did the Fourth Circuit err in "concluding", as a matter of ultimate fact, "on the evidentiary facts found by both Courts" (which of course included a host of controlling facts found by them adversely to Local 28 but not even alluded to in this question), that the IP did not violate his fiduciary duty in revoking the charter of Local 28?

If it is appropriate at all for petitioners to ask this Court to re-examine (a) the legal questions which petitioners won, and (b) the purely factual issues which petitioners lost, in this long and complex trial (which we emphatically deny), petitioners' Questions Presented Nos. 1, 2, 3, 5 and 6, must,

at the very least, be recast to eliminate erroneous slanting,[5] and to read as follows:

1. Whether the Court of Appeals erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts, that *the International President (IP) of the IBEW did not violate his fiduciary duty to the members of Local 28* under Section 501(a) of the Landrum-Griffin Act, in revoking the charter of Local 28, (a) for its flagrant breach of contract in engaging in a strike without obtaining his consent, when such consent was expressly required by the IBEW Constitution, and (b) for defiantly refusing to end the strike, notwithstanding repeated protests, reason-

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[5] If certiorari should be granted, notwithstanding respondent's opposition to this petition, respondent, in its defense, would expect to argue its side of all the questions attempted to be presented by petitioners, including the jurisdictional questions, and, in addition, respondent reserves and would desire to argue four additional questions, which are:

(1) Whether the action of the International Executive Council (IEC) of the IBEW (after hearing all of the additional evidence which petitioners desired to offer upon the question of the IP's good faith in conducting the revocation proceedings and in revoking Local 28's charter, including depositions of the IP and others taken after the hearing before the IP), in affirming the charter revocation and in finding expressly "that the IP conducted himself properly is beyond question" (App. 803), conclusively determined the validity of the IP's action. The IEC, being the parties' chosen instrument, if its decision is enforceable under § 301 of Taft-Hartley, "it is of course not open to the courts to reweigh the merits of the grievance". (*See General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss & Company, Inc.*, Oct. Term, 1962, decided Mar. 18, 1963; *United Steel Workers* v. *American Mfg. Co.*, 363 U. S. 564, 567-8);

(2) Whether petitioners were barred from relief by failure to take and exhaust their intra-union remedies;

(3) Whether petitioners were barred from relief by their unclean hands. (The District Court found that the hands of Local 28's leaders, by reason of their breach of contract and other misconduct, were unclean, but erroneously refused, notwithstanding the common law of agency and the Federal statutes 29 U.S.C., Secs. 152(13), 185(b), 185(e) (see Appendix to this brief, pp. 1, 2), to attribute such unclean hands to Local 28 and its members, who, nevertheless, had consciously and knowingly authorized and ratified their leaders' actions. The Court of Appeals reversed the District Court on other grounds, so it was not necessary for it to determine this question); and

(4) Whether, if there was any infirmity in the revocation procedure followed, the respondent, to uphold the integrity of its organization, is still free, as the Court of Appeals held (App. 78, Ft. 86), to conduct a retrial of Local 28 for its unauthorized strike, which strike is still continuing.

ings and warnings from the IP over a period of months to each of the officers and members?

2. Whether the Court of Appeals erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts (and the findings of the District Court that the IP acted "to maintain *necessary* union discipline" and without "ill will" or "express malice"), that *the IP had sufficient proper objectives* in bringing revocation proceedings against Local 28?

3. Whether the Court of Appeals erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts, that the three hearings accorded Local 28 (i.e. (1) before the "fair and impartial" Referee, (2) before the IP, and (3) before the completely "unbiased" International Executive Council (IEC),[6] (each of which hearings fully complied with the IBEW Constitution), were "full and fair", and therefore valid under Sections 101(a)(5) and 609 of the Landrum-Griffin Act?

4. (Relates to alleged "trusteeship".)

5. Whether both Courts erred in not making additional findings, although not requested by petitioners to do so,[7] expressly *applying the label of "unfair labor practices"* (or in not expressly stating that such characterization was inapplicable) to the conduct of (a) the union or (b) the employers, in their collective bargaining negotiations prior to Local 28's unauthorized strike, (which conduct, however, was fully disclosed by the evidence and considered and

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[6] The Court of Appeals noted (App. 33) that "the IEC was found to be unbiased". The District Court found the fact-finding Referee to be "fair and impartial". (App. 50.)

[7] With regard to Question Presented No. 5, Petitioners did not suggest such a finding in their elaborate "Request for Findings" made to the District Court. Furthermore, in the Court of Appeals they defended, and praised as "careful", the failure of the District Court to make this finding, arguing that, since all the evidence bearing on the IP's conduct and motivation was admitted, the failure so to characterize it was not "crucial" (Petitioners' brief, pp. 76-77).

weighed by both Courts as it bore on the issues of this case)?

6. Whether both Courts erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts as to the numerous instances of misconduct of the leaders listed by the District Court, and the concession of the petitioners[5] (Jt. App. 384-5) that the IP "had no personal malice toward the individuals" in Local 28, that the IP, in refusing to consent to Local 28's strike, *did not violate his fiduciary duty to these leaders of Local 28*, or have bad faith and illegal purposes toward *these leaders*, and that, if such conclusions of both Courts were in error, *these leaders*[8] of Local 28 should be perpetually immune from all disciplinary action for their part in fomenting and continuing the unauthorized strike?[9]

7. (Relates to denial of damages and counsel fees.)

8.—11 (Relate to questions of jurisdiction and substantive law decided in favor of petitioners.)

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[8] Notwithstanding the revocation of Local 28's charter in August 1961, the membership in IBEW of the rank and file members of Local 28, with all its attendant benefits, including participation in the International's pension and other funds, has been continued to date, and those members have been free to transfer their local membership to other IBEW locals, including Local 24 in Baltimore, and hundreds of them have done so. Furthermore, respondent has not attempted to touch Local 28's own pension or other funds, the investment of each member of Local 28 therein having been fully preserved. The disciplinary proceedings against 15 officers and ringleaders of Local 28 for their individual part in the unauthorized strike were not a part of the present civil actions. Such disciplinary proceedings were *separately* instituted before the IEC, which imposed appropriate discipline against these leaders, and its decisions have been duly affirmed on appeal by the International Convention, which met in September 1962. The prosecution of these separate disciplinary proceedings against the leaders, and the enforcement of reasonable discipline which might be legally imposed, "including expulsion", was expressly permitted by the decree of the District Court (Jt. App. 49).

[9] As we have seen, the District Court found the hands of these leaders to be unclean. No challenge is made by petitioners to the numerous findings of fact as to their bad conduct on which this conclusion rests. There is no possible ground for this Court even to consider Question Presented No. 6 upon whether these "reckless" leaders (Jt. App. 43) shall be awarded perpetual immunity.

STATUTES INVOLVED AND ADDENDUM TO FOURTH CIRCUIT'S OPINION

The pertinent statutes involved not set forth in the petition are printed in Appendix to this brief, and are as follows:

National Labor Relations Act (NLRA)

§ 2(13), 29 U.S.C. § 152(13), App. to this brief p. 1.

§ 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), App. to this brief, p. 1.

Labor Management Relations Act (LMRA)

§ 201(a)(6), 29 U.S.C. § 171(a)(6), App. to this brief p. 1.

§ 301(b), 29 U.S.C. § 185(b), App. to this brief p. 2.

§ 301(e), 29 U.S.C. § 185(e), App. to this brief p. 2.

Labor Management Reporting and Disclosure Act (LMRDA)

§ 3(o), 29 U.S.C. § 402(o), App. to this brief p. 2.

§ 101(a)(1), 29 U.S.C. § 411(a)(1), App. to this brief p. 2.

§ 101(a)(2), 29 U.S.C. § 411(a)(2), App. to this brief pp. 2-3.

In the appendix to this brief is printed an additional paragraph of the Opinion of the Court of Appeals, which was issued later and hence not included in the appendix to the petition. It should be read as if inserted as the first full paragraph on App. 38 of the petition.

STATEMENT OF THE CASE

The District Court's Decision and Fact Findings

Respondent is dissatisfied with petitioners' description of the action of the District Court, mainly (1) because it claims that the Court found "bad faith" on the part of the IP, which is contrary to fact,[10] and (2) because the description sets out some of the factual conclusions which were favor-

[10] The District Court found that the IP, in revoking the charter, had "mixed motives", many of them worthy ones to enforce "necessary" discipline, but also including "anger" at the institution of suits by a few of Local 28's members many months previously, and, therefore, a "breach of fiduciary duty", but nowhere in its opinion did it find "bad faith" on the part of the IP. That is petitioners' characterization.

able to petitioners but omits to mention the many more controlling evidentiary facts which the District Court found against petitioners. An assembly of direct quotations of such findings which are scattered throughout the District Court's opinion will supply the omissions and also serve as respondent's *Statement of Facts*, correcting many erroneous statements in petitioners' present statement. With only a few suggested "amplifications" and "modifications", petitioners "adopted" in their brief in the Court of Appeals (p.2) the entire statement of facts made by the District Court,—necessarily including these quotations as well. In selecting only the quotations in respondent's favor to arrange them in logical sequence, we have had to remove some of them from their context, but that has not distorted them, because each of them, separately considered, is an independent valid finding. We quote as follows from the District Court's opinion:

(a) The merits and fairness of the Council on Industrial Relations (CIR)

The IBEW Constitution provides, "'The IP has the right to correct any by-laws, amendments, rules or agreements [of any local] to conform to this Constitution *and the policies of the IBEW.*'" (Jt. Ap. 16). "• • • the *policies* which *shall* be followed by the officers are matters *for the union as a whole* to decide, subject to the restraints imposed by law" (Jt. App. 40). "The 1958 International Convention refused to eliminate *the reference to 'policies'*" (Jt. App. 16).

"For many years it has been *a policy of the IBEW to discourage strikes*, and to encourage its locals to include in their collective bargaining agreements with local chapters of NECA a 'Council clause', requiring the parties to submit to the Council on Industrial Relations • • •, a bipartite group set up by IBEW and NECA, all disputes between the local and the chapter (Jt. App. 16). "The Council • • • *is a part of the collective bargaining process at a higher level* • • •." "• • • *most of the locals* have in their agreements clauses requiring the submission to the Council not only of disputes about working conditions and the like during the term of the agreement, *but also proposed changes in wages*

and working conditions at the end of any contract year, if the local labor-management committee is unable to reach an agreement". " * * * it was *generally* but not universally, *believed that such agreements were 'evergreen' contracts*, i.e. perpetual agreements terminable only by mutual agreement, by permission of the Council, or by the possible dissolution of the Council by IBEW and NECA" (Jt. App. 16-17).[11] "I stated that it is *highly desirable* that the local unions of IBEW and the chapters of NECA take advantage of the services of the Council; the evidence shows that *it has served all parties well over the* years. I adhere to the view that the Council has served parties well over the years. *Wages have steadily increased*, in line with other comparable building trades, *and there have been remarkably few strikes.*" "The IBEW Constitution * * * contains provisions which appear to authorize the control over the affairs of the local unions exercised by the IP" (Jt. App. 40). "In 1958, 1959, and 1960 the Local and the Chapter submitted wage disputes to the Council, which granted an *increase in each instance* [12] not as large as the Local wanted, but *not unfair or unreasonable under all the circumstances*, including the wage rates of comparable building trades in Baltimore, *where unions are not as strong* as in Philadelphia, Wilmington and Washington" (Jt. App. 19-20).

(b) The unreasonableness of Local 28's so-called collective bargaining in 1961.

During the entire five months of collective bargaining in 1961, Local 28, without deviation, "*demanded* 35c hourly wage increase for the first year and sought comparable amounts for the two years thereafter" (Jt. App. 20). This was a "*continued demand* for 35c for the first year". "The leaders of Local 28 were *determined to strike* if they could not obtain their *demands* by negotiation" (Jt. App. 24).

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[11] Of approximately 800 working agreements involving members of NECA, some 90% (in excess of 720) contain a council clause in one form or another generally believed to be "evergreen" (App. 11, Jt. App. 135).

[12] The Court of Appeals found that the Council "granted Local 28 hourly wage increases of 15c, 17½c and 10c in these three years, respectively", and that their fairness was not "contested" (App. 15).

"Such an increase * * * may have been *unrealistic* in view of the *strong non-union situation* in Baltimore" (Jt. App. 25). "International Representative Adams told them [i.e. Local 28] in April that they were 'shooting for the moon.'" (Jt. App. 20).

(c) The IP's proper and normal relations with NECA, the ineffectivenesss of the so-called "tentative decision" of the Council, and the IP's failure to insist that Local 28 accept the "evergreen" Council clause.

"As this Court has pointed out on a number of occasions, the officers of the Internationl and of NECA have a *common interest* in the Council as a means of stabilizing labor relations in the industry, which renders *a large measure of cooperation* between the two national organizations *reasonable and desirable*[13] (Jt. App. 21). "In the case at bar Local 28 has *failed to prove* that news of the 10c tentative decision [of the Council on May 15] was communicated to the Maryland Chapter [the Baltimore employers]. * * *" (Jt. App. 23). "On June 2 [two weeks later] the Council, through its executive committee, filed a 'Decision', stating that in view of the pending litigation, *no decision should be issued*" (Jt. App. 23).

"Plaintiffs *contend* that the act of the IP [i.e. August revocation proceedings] was taken in furtherance of his effort to require Local 28 to include the yellow sheet 'evergreen' Council clause in its agreement with NECA, and was therefore illegal. In the first place, there is *some doubt* whether, *after* the decision of the Court in May and the dismissal of the appeal in *June*, the IP really *intended to require* that the yellow sheet clause be included in the agreement. It was *eliminated* from the agreements signed by Local 24 and by the Washington, D. C. local, perhaps because the IP regarded the leadership of those unions differ-

[13] The Court of Appeals found: "For years NECA and IBEW have conferred on a national level to further their common interest in stabilizing labor relations in the electrical construction industry" (App. 6), and "The International was dealing day by day with many chapters of NECA and the International's relations with NECA were important to the welfare of all 150,000 who worked in the construction industry" (App. 36).

ently, and perhaps because of legal advice he received during the summer and early fall" (Jt. App. 39).

(d) Local 28's first violation of the IBEW Constitution by abrogating its collective bargaining agreement.

The contract of the parties, "the IBEW Constitution, provides * * * 'No agreement of any kind or nature shall be abrogated without sanction of the IP.' *The abrogation of the agreement* * * * between Local 28 and the Maryland Chapter [i.e. Local 28's termination on March 31, 1961 of its collective bargaining agreement] *was not sanctioned by the IP*" (Jt. App. 38).

(e) Local 28's second and third violations of the IBEW Constitution by its two unauthorized strikes.

The IBEW Constitution also, by the "*plain meaning* of the words", required Local 28 to obtain the IP's consent to its strikes. "Moreover, * * the IBEW Constitution * * * permitted an appeal to the IEC from the decision of the IP that this was a strike or work stoppage which required his consent and *no such appeal was taken by Local 28*" (Jt. App. 33). Such consent requirements "are *common* in the building trades and other industries" (Jt. App. 32).

Local 28 in 1961 engaged in *two* unauthorized strikes, the first, which lasted for several weeks in April and May, "the attorneys for Local 28 describe * * * * as a wildcat strike but I find it was *subject to the control* * * * of the president and business manager of Local 28 and O'Doherty, its attorney, who more and more assumed the leadership and direction of the Local."[14] "Local 28 had not asked for nor received permission to strike from the IP" (Jt. App. 21).

Local 28's second unauthorized strike began in June, "the business manager * * * stating *falsely* that the Local had been given a 'green light' " from the IP, and has continued to date (Jt. App. 24). When advised of this second strike,

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[14] The Court of Appeals has pointed out, "Other than to note its surprise, the Local makes no effort to contest this finding, except to point out that the finding was not that the strike was *caused* by the Local's leadership" (App. 19, ft. 13).

"the IP *promptly* replied by telegram on June 15 that *any strike without his consent would be in violation of the IBEW Constitution*, and that he *was refusing his consent* in this case" (Jt. App. 25). "The telegram was received by the executive board of Local 28 *before the strike began*, but it was not brought to the attention of the members of the Local" (Jt. App. 26). "On June 20 • • • the officers of the Local agreed [with the IP] that a meeting of the Local would be held on June 22, and that the IP's telegram of June 15 would be read to the membership. This was done • • • " (Jt. App. 26).[15] "The IP owed a duty to the *union as a whole*, and *could not properly grant permission* to one local to engage in a strike which he felt to be contrary to the best interests of the IBEW • • • (Jt. App. 38).

"• • • engaging in a strike without the consent of the IP is a *serious offense, justifying expulsion*", and, it "is, of course, a serious breach of discipline, for which a member may be expelled,[16] *or a charter be revoked*, after a fair hearing" (Jt. App. 36, 37). The "local union • • • flout[ed] the Constitution and policies of the International and still claim[ed] the rights and privileges of membership therein" (Jt. App. 40). The members of Local 28 "followed *the reckless leadership* of their officers". "• • • the local's stubborn insistence in *striking in defiance of the IBEW Constitution* without appealing from the action of the IP, in refusing his consent to the strike, might be sufficient to bar relief, if we were dealing only with the rights of the leaders and officers of the Local" (Jt. App. 43). "Under all the circumstances it would be *unjust and unreasonable to allow damages* to the Local". "Nor should any counsel fee be allowed to plaintiffs against IBEW in either case". "In view of the

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[15] The Local's attorney "disagreed with the I.P.'s construction of the Constitution" and the members unanimously gave a "vote of non-concurrence" with the I.P.'s decision (Jt. App. 26-27). The Local did not appeal from the I.P.'s decision to the I.E.C. nor comply with the I.P.'s decision pending appeal in violation of the requirements of the IBEW Constitution (IV, 3(2), XVII, 13, XXVII, 16; Jt. App. 61, 67, 71).

[16] Such power of expulsion is given *express* recognition both by the Taft-Hartley Act and the Landrum-Griffin Act. 29 U.S.C. §§ 158(b)(1)(A); 402(o) (See Appendix to this brief, pp. 1, 2).

part played by the attorney for Local 28 in the events leading up to the strike and immedately thereafter * * * the decree will provide that no fee be paid to any attorney *out of the funds of Local 28* without approval of the Court" (Jt. App. 45). This attorney misled the membership of Local 28 with "unsound legal opinions, frequently reiterated" (Jt. App. 43).[17]

"The decree will not prevent the proper officials of the IBEW from pressing the charges they have heretofore filed against such individuals, [i.e. against the leaders of Local 28 for their part in the strike] before any tribunal, nor from enforcing any reasonable punishment, *including expulsion*, which may be legally imposed" (Jt. App. 45, 46). "This decision does not mean that Local 28 may *continue with impunity* to flout the Constitution and policies of the IBEW". Local 28 must observe the IBEW Constitution, "if Local 28 wishes to continue as a part of that union" (Jt. App. 46).

(f) The situation during the 6-week period from the start of the June strike to the charter revocation.

On June 20, Local 28's leaders told the IP that "Local 28 [had] entered into *interim* agreements with a dozen or so contractors * * * providing for a wage increase of 35c" but requiring the Local "*to reimburse the contractor for the differences* between the 35c an hour paid under the contract and the wage ultimately agreed upon between the Local and the Maryland Chapter" (Jt. App. 26). "The IP stated that he wished them well in their negotiations, but that he wanted any unresolved *issues* to be submitted to the Council. He refused to consent to the strike * * *" (Jt. App. 26). On July 12, the IP told them "that the only way Local 28 *could avoid* disciplinary proceedings would be to return its members to work and submit all unresolved issues to the Council" (Jt. App. 28). As of this time, there is "doubt"

[17] In view of these unchallenged findings as to the attorney's conduct in these matters and in leading and directing the first and second unauthorized strikes, suggesting, by Question Presented No. 7, review of the District Court's disallowance of counsel fees is sheer audacity.

that "the IP really intended to require that the yellow sheet clause be included in the agreement." (Jt. App. 39). "The hearings before the referee were held on July 17-21. He made a prompt report to the IP, before whom an oral argument was held on July 28"[18] (Jt. App. 28). "No doubt the referee Schedler was a fair and impartial man * * *" (Jt. App. 35). "On August 1 the IP issued a Decision and Order, revoking the Local's charter *unless the Local returned its men to work by August 7* * * *"[19] (Jt. App. 28). "On August 5 the members of the Local voted to support its officers 991 to 2" (Jt. App. 29). "There was *no sufficient evidence* that the IP was moved by what is sometimes called *express or particular malice*, i.e. ill-will, spite, a grudge, or a desire to be revenged on a particular person or persons, resulting in a deliberate intention to commit an injury" (Jt. App. 38). One reason for his action was "to maintain *necessary* union discipline"[20] (Jt. App. 37).

(g) The hearing before the IEC.

"On September 12 the IEC heard argument on the appeal of Local 28 * * *". "Although apparently under the IBEW Constitution it might have refused to entertain the appeal because Local 28 had not complied with the order from which the appeal was taken" (Jt. App. 30). "* * * the attorney for Local 28 was allowed to read [in the hearing before the IEC] from the depositions of the IP and other

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[18] The Court of Appeals found: "On July 25, the referee reported his findings to the IP that the Local had gone out on strike on July 19 and continued the strike without requesting or receiving consent of the IP, that this was a work stoppage requiring the IP's permission, that by his telegram of June 15 the IP had refused his consent, and that this fact was known in sufficient time to have cancelled the strike" (App. 26-27).

[19] The Court of Appeals found that: "Copies of the order were mailed to all members of Local 28, with a letter from Freeman explaining the action that must be taken to comply, and the consequences to the Local and its members of failure to comply" (App. 27). The Court of Appeals also found "Severe measures were taken against the Local, but only after full opportunity had been given the strikers, first to comply with the IP's back-to-work order and later, *in the revocation decision itself*, to redeem themselves" (App. 36).

[20] The Court of Appeals found: "the District Court found that the IP had been motivated in part by a legitimate desire to discipline the Local, its members and officers, for having engaged in an unauthorized strike *even after his repeated orders to return to work*" (App. 34).

witnesses which had been taken for use in the *Parks* case [21] and to challenge the good faith and impartiality of the IP and the members of the IEC in the course of his intemperate and ill-advised argument" (Jt. App. 36). "* * * on September 30 [the IEC] affirmed the order of the IP" (Jt. App. 30).

(h) None of the court actions brought by certain members of Local 28 while it was in trusteeship in 1959 and 1960 involved the IP personally or was important or successful.

None of these three suits was ever tried and they were all mooted months before Local 28's first unauthorized strike in April 1961, with a long period of cordial relations in between. Neither the IP nor Local 28 was a party to these suits or participated in them in any way. They were each instituted by six or seven members of the Local. As to the first of these actions, instituted in 1959, against the Trustee and the local's accountant to enjoin a referendum proposed to the local's membership by the Trustee, the District Court said: "After attempting to have the referendum withdrawn, but without exhausting their intra-union remedies, some of the members of Local 28 filed an action in this Court to block the proposal which had received the largest number of votes. Most of the members had abstained from voting, *so the IP refused* to put the proposal into effect, and the court action was dismissed by stipulation" (Jt. App. 18).

As to the second action, instituted in early 1960, against the IBEW, the Trustee and the local's treasurer, to set aside the trusteeship, the District Court said: "* * * the trusteeship was terminated by order of the IP dated June 30, effective August 5 [1960]" (Jt. App. 19).

As to the third action also instituted early in 1960, against

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[21] The Court of Appeals found that these depositions were "with respect to the IP's good faith in revoking the charter" (App. 28). Under the IBEW Constitution the IEC was authorized to hear and consider this *additional* evidence not in the record before the IP. Only in *second appeals* (as contrasted with appeals to the IEC from *original* action of the IP in which additional evidence can be offered) is the tribunal confined to the evidence submitted in the original *case of appeal* (Jt. App. 72).

the Trustee and the IEC to enjoin disciplinary measures against the plaintiff members for violating the IBEW Constitution, the District Court said: "The charges against Eveson et al. were heard by the IEC on June 17, 1960, * * * and the IEC disposed of the charges with a finding of mitigating circumstances. The actions in this Court, *having become moot*, were closed out in December 1960. From August 1960 until March 1961 the relations between Local 28 and the International officers were apparently friendly" [22] (Jt. App. 19).

(i) Other important facts found by the District Court during hearings.

On May 11, 1961, when it announced its decision in the action brought by Local 28 against the Maryland Chapter to abrogate its collective bargaining agreement (194 F. Supp. 494), the District Court, in the presence of several hundred Local 28 members, warned Local 28 and its members, in emphatic terms, that "If you refuse to go ahead with this policy the International has set up and which all of the other locals go along with [i.e. submission of unresolved disputes for bargaining before the Council], and strike, the International would *very likely* revoke your charter with whatever loss there is", and that the legal effect "may be severe". The Court further said, "I think you then can't expect to come to the Court and ask for protection against the International, *if you terminate and strike*" (Jt. App. 845-6), (App. 53).

During the trial of the present cases, when the plaintiffs had completed over 80% of their case-in-chief, the District Court ruled that they had offered no evidence of collusion or conspiracy between respondent and NECA. The validity of the ruling was never later impaired. The Court said:

"You have certainly proved that they [IBEW and

[22] During this period there were a number of instances of cooperation between the two unions and their officers and Local 28's business manager testified that he and respondent were then "working together * * * with no problems at all", and that he had "a feeling that we were one of each other" (Jt. App. 331). The Court of Appeals also found "There is no evidence of further difficulties between the International and Local 28 from August, 1960, to March, 1961" (App. 14).

> NECA] had a common desire and interest in having the council clause in all of the contracts, but that is not, I do not conceive that that is illegal or that it amounts to conspiracy or anything improper, if they tried to accomplish a result which they honestly believed to be good. * * * But letting it [the evidence] in, subject to exception as I am doing, does not mean that I think you come within a mile of proving up to this time a conspiracy between IBEW and NECA to have the charter of Local 28 revoked. There has not been the slightest suggestion of that in the evidence" (Jt. App. 315). "* * * I have not got a shred of evidence that there was any effort on the part of NECA, either nationally or locally, to have the 28 charter revoked, or that that has been suggested to them by anyone. * * * The only thing that is before me, if there is any conspiracy between the International Union and NECA, that NECA did not bargain in good faith, and I say that you have not proved--you have not offered any evidence, in my opinion, legally sufficient to prove that yet" (Ja. App. 316).

In its opinion in the present cases, the District Court said, "On August 4, in the suit which Local 28 had filed in this Court on July 17, the Local filed a motion for a temporary restraining order to block the operation of the August 1 Decision and Order of the IP [the revocation order] * * *. A hearing was held before me on August 8 * * *. On August 14, this Court filed its opinion, 197 F. Supp. 99, refusing to issue a preliminary injunction and dismissing the complaint without prejudice. The opinion * * * concluded that this Court should not entertain the case until the IEC had been given an opportunity to decide the appeal which Local 28 had theretofore taken. The Court found that *no denial of procedural due process*, by the referee or the president had been shown *by any fact alleged* or presented to the Court at that time, 197 F. Supp. at 108". **(Jt. App. 29).**

In this connection it should be noted that in the argument before the District Court on August 8, in 197 F. Supp. 99, the facts were *fully disclosed* to the Court that the IP had not only preferred the charges in the revocation proceedings but had decided the case. On those allegations, the Court

said on August 14 that the charge that due process was lacking was "answered by the admitted facts", and, further, that "the propriety of the action of the president can be and presumably will be decided by the appropriate union tribunal" [23] (197 F. Supp. at pp. 107, 108).

In the present case, at the hearing on a motion to dismiss the suit brought by Local 28's *members*, the District Court, on the subject of the complicity of the rank and file members, stated: "• • • but none of these men [the members] have alleged that they *protested* the action taken by the local union. I take it that all of these members went along with the action; if the action of the local union was contrary to the Constitution, *they did it with their eyes open*, and must suffer the penalties which may properly be imposed upon them under the Union Constitution • • •. But these men are not people who are really caught in the middle; *they are essentially the local union*. The allegations I have made [read] is that all but two or three of the local union members voted to support leaders of the local in defying the International President [24] • • •" (Jt. App. 880).

(j) Some additional errors in petitioners' statement of facts

The above collection of District Court findings will correct many of petitioners' erroneous statements. Among others that need to stand corrected, however, are the following:

1. The repeated, over-protesting claims in the petition that Local 28's "defense" in the revocation hearings before the IP was "based on the impropriety of his own conduct in the matter out of which the charges arose" (p. 3); that "the Local called upon the IP to be a witness, among other

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[23] That issue was, of course, decided by the IEC and the propriety of the IP's conduct and action was fully upheld (Jt. App. 803).

[24] The Court of Appeals also held: "The general membership cannot *on this record* be cast in the role of blameless victims. • • • it is undisputed that when they later learned the truth they supported these leaders willingly enough in flouting the International. This they did in disregard of the District Judge's clear caution given May 11, 1961, in open court in the presence of several hundred members and despite three personal letters from the IP sent to each member" (App. 53).

things, concerning * * * 'the propriety of his own actions and his own good faith and motives'" (p. 18); and that the IP "refused to testify when the propriety of his own conduct was called into question and his testimony was vital to the Local's defense" (pp. 26-7); that the IP "refused to appear as a witness although his testimony was vital to the defense" (p. 32); that the IP failed "to submit himself as a witness to the Local, whose defense was based on calling into question the propriety of his conduct" (p. 32), are *simply contrary to conceded fact*. It was a *concessum* by Local 28 that the charge of bad faith on the part of the IP was first made toward the close of the hearing before him on July 28, long after the hearing before the referee and the referee's findings, and only three days before the revocation order itself. It was also a *concessum* that Local 28 made no proffer of what, if anything, it expected to prove by the IP's testimony. It was also conceded by petitioners in their answers to interrogatories that, at the time the revocation proceedings began, they had no information or knowledge of the many things which they later claimed to have discovered by the taking of depositions and which they alleged, and attempted, without success, to prove, against the IP in the later hearing before the IEC (Jt.-App. 97-8).

During the trial, the District Court expressly recognized, based on these concessions of counsel, that Local 28 (a) made no proffer of the IP's testimony and (b) did not raise any question of the IP's good faith until July 28, 1961, *near the very close of the revocation proceedings*. The colloquy was as follows:

> "(The Court) While we are on the question, did Mr. O'Doherty [attorney for Local 28] make any proffer as to what he undertook to prove by Mr. Freeman [the IP]? * * * Was this a fishing expedition, or did he make a proffer of what he intended to prove?
>
> (Mr. Sykes, attorney for Local 28) There is no provision for a formal proffer. He did not make a formal proffer of what he intended to prove * * *.
>
> (The Court) * * * I haven't seen any charge of bad faith up to that time * * *.

(Mr. Sykes) I might say on that, your Honor, that the charge was made in its crystal form in the argument before the IP sometime *late in July*, but the reason for that is that *we did not know* about this and about the connection with NECA and the whole business, the meetings and what-not, and the fact that *the defendant was successful in concealing* these things from us up to a certain point shouldn't be used as an argument for denying us the right to make a claim."

(The Court) • • • I see nothing at this point except that Mr. O'Doherty was fishing. • • • Mr. O'Doherty didn't even request, so far as I could see, that the matter be shifted to the Council [IEC] • • •" (App. 255).

It is also highly important to realize that in neither Local 28's first complaint (Jt. App. 821-831) filed in the District Court on July 17, during the revocation proceedings, nor in its motion for temporary injunction, filed August 4, after the revocation order was issued, were the IP's good faith and propriety of his conduct drawn in question.

Furthermore, in his oral argument at the hearing on the motion for a temporary restraining order held August 8, after the revocation order had taken effect, the attorney for Local 28 stated that "we feel that we can establish by the evidence" some collusion between the IP and NECA. Thereupon the District Court queried, "Have you alleged that?" and Local 28's attorney responded, "No, as yet we haven't. • • • *Since that time* [the revocation hearing] many things, many important things have come to us that we feel that if given an opportunity to show the Court that there was coercion [sic] between International and NECA in order to destroy the Local union or to drive us before the Council on Industrial Relations" (Jt. App. 833-4). And later in that hearing, the Court said to Local 28's counsel, "• • • but I am not going to continue a preliminary injunction *while you hunt for grounds.* • • • I want to give you every opportunity to develop your case • • • and to give you such discovery or anything else that would aid you in doing it, but I can't hold them down by an injunction while you go fishing" (Jt. App. 838-9).

2. Again strong invidious implications on pp. 3 and 18 of

the petition, to the effect that IBEW's long established policy in favor of including the "evergreen" Council clause in the collective bargaining agreements of its locals was kept "secret" from the locals, are not true. On the contrary, "evergreen" Council clauses were contained in model agreements for IBEW locals and NECA chapters issued as early as September 15, 1931 (DX 70, Jt. App. 929-30). Furthermore, the 1958 International Convention turned down an attempt to leave it to the locals to decide whether or not they should use the services of the Council (Jt. App. 727) and, similarly, rejected an effort to amend the IBEW Constitution to nullify the IP's power to determine and enforce these "policies of the IBEW" (Jt. App. 724-5). The District Court found " it was *generally*, but not universally, *believed* that such agreements [the usual collective bargaining agreements] were 'evergreen' contracts, i.e. perpetual agreements terminable only by mutual agreement, by permission of the Council, or by the possible dissolution of the Council by IBEW and NECA" (Jt. App. 16-17). This statement was based upon a *concessum* by Local 28's counsel that "*everyone* apparently thought until your Honor's case • • • that the old form of Council clause was really an evergreen contract • • •" (Jt. App. 334).

3. Petitioners' statement on p. 26 of the petition that the 10c wage increase recommended in the so-called "tentative decision" of the Council on May 15, 1961, was an "unreasonably low wage increase beyond which Freeman would not support the Local" is wrong in two particulars. There is no evidence that the IP would not support the local for a higher wage. Again, a wage increase of 10c at that time was not unreasonably low,[25] but compares favorably with the increases of 15c, 17½c and 10c granted Local 28 in 1958, 1959 and 1960 (App. 15), which the District Court found to be "not unfair or unreasonable under all the circumstances, including the wage rates of comparable building trades in Baltimore, where unions are not as strong as in Philadelphia, Wilmington and Washington" (Jt. App. 20).

[25] Local 28's journeymen were at that time earning $3.85 per hour (Jt. App. 690). A ten cent raise would have put their wages in line with plumbers, steamfitters and sheet metal workers new rates for 1961.

It was also established in the case that the wage rate increases "for comparable building trades in Baltimore" were, for plumbers and steamfitters, 10c in 1960, 12c in 1961, and 13c in 1962, and for sheetmetal workers, 10c in 1960, 10c in 1961, and 15c in 1962 (Jt. App. 927-8). It should be realized also that this tentative recommendation for a 10c increase carried with it a recommendation omitting for Local 28 the "evergreen" Council clause.

4. Another outrageous mis-statement occurs on p. 27 of the petition to the effect that the District Court stated that the IP was "in league with the wolves" in the establishment of Local 24. Here the reference given (Jt. App. 593) clearly shows that the District Court, in colloquy, was merely posing a rhetorical "question", i.e. "whether Freeman was acting as a good shepherd or whether he was in league with the wolves".

5. Another glaring error in the petition is the statement on p. 34 that damages to Local 28, by reason of the revocation of its charter, "were stipulated to amount to $50,-662.64". The record reference which petitioners give for that statement is Jt. App. 714. Reference to that citation shows that the figure was stipulated to be merely "losses in assessments of Local 28 from June 1961-December 1961 as compared with the assessments collected in the same period in previous years". Obviously, this is no stipulation that there were any *damages occasioned by the revocation order* effective August 7, 1961. On the contrary, quite clearly, Local 28's drop in assessments (which are only paid to it out of wages earned when men are working) during the strike period, June-December 1961, as compared with previous years is attributable to Local 28's members refusing to work during the period July to December, 1961, because Local 28's unauthorized strike was in progress.

The Court of Appeals Decision

For lack of space we shall not labor the factual findings of the Court of Appeals. That Court accepted the evidentiary findings of the District Court, heretofore quoted. But it quite properly rejected that Court's *non sequiturs*, and

merely drew the correct and inescapable conclusions from the basic facts so found.

The heart of its decision lies in the following quotations from its opinion:

"While clearly correct in its recognition of the theoretical basis for judicial intervention, we think that the court [below] *erred in applying these principles* to the facts it had found." (App. 33).

"The refusal to sanction the June strike cannot be said to be a breach of a fiduciary duty owed the plaintiffs under the Constitution. If the IP believed that an appropriate Council clause could be negotiated and that Local 28 was excessive in its demands and 'shooting for the moon,' it was his prerogative to restrain the Local, and if possible to counteract its headstrong determination to wage a strike that could adversely affect the cause of his international organization. His duty was to 750,000 members, not merely a few who might gain a short-range advantage that could prove costly to the parent body, the employers, the public and, in the long run, to the plaintiffs themselves" (App. 35-36).

"Here it was not misconduct or a violation of fiduciary obligation for the IP to press for the reference of all unresolved bargaining issues between the Local and the Maryland Chapter to the Council for final solution. * * * *If this International insists that its locals shall complete the collective bargaining process before the Council*, composed equally of representatives of the International Union and of the Employer Association, *such insistence is certainly not illegal*" [26] (App. 42, 46).

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[26] "* * * the basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare". *Teamsters Local* v. *Lucas Flour Co.*, 363 U.S. 95, 105. See also, *Textile Workers* v. *Lincoln Mills*, 343 U.S. 448, 455; *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581. And see 29 U.S.C. § 171(a)(b) (Appendix to this brief, p. 1). The bricklayers, tile and terrazzo workers, painters, plumbers, pipefitters, and the seven basic trades, among others, utilize extension of collective bargaining at a national level to arbitrate disputes which cannot be resolved on a local level (Jt. App. 492-97). The same system is common in Great Britain and Western Europe (Jt. App. 497).

The AFL-CIO in its Amicus Brief filed in the Fourth Circuit emphasized the important public policy considerations which support the IBEW'S participation in the Council on Industrial Relations.

"What has been granted the parent body as its proper province in collective bargaining and what has been retained by the local—perhaps it is more accurate to put it the other way: what has been retained by the parent and what has been granted to the subordinate—is a matter of internal government *resting upon the contract* the local and its members have made in accepting a charter from the parent. * * * in the absence of specific legislation,[27] it does not lie within the authority of a court to give effect to its general preferences between international power and local autonomy in matters of collective bargaining" (App. 37).

"We do not agree that, on the facts in this case as established in the [lower] court's findings, there was a procedural defect in the trial before the IP[28] justifying a court

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[27] Legislative history makes it crystal clear that Congress intended to impose no restriction upon an international's participation in the collective bargaining process. The Court of Appeals in an *addendum* to its opinion (see Appendix to this brief, p. 3) said that it is "noteworthy that in the initial drafts of the bills that became the Taft-Hartley Act (LMRA), provisions were included in both Houses that would have either prohibited industry-wide bargaining or explicitly guaranteed to local unions the right to conduct their own collective bargaining entirely free from international interference. There was extensive debate on these proposals. * * * Consequently no such restrictive provisions were enacted. See references under 'Industry-wide Bargaining,' in the Topical Index to the *Legislative History of the LMRA* at p. XXXVI."

[28] Legislative history of Sec. 101(a)(5) of the Landrum-Griffin Act makes it crystal clear that Congress did not intend to require an impartial tribunal for intra-union disciplinary hearings. An express provision requiring such an impartial tribunal was considered by Congress *and rejected*. Thus, the McClellan Bill (S. 1137) and the McClellan Amendment to the Kennedy-Ervin Bill (S. 1555), as well as the Kearns Bill (H. R. 7265), each provided that union disciplinary procedural requirements must include, *inter alia*, the opportunity for "*final review* on a written transcript of the hearing, by an *impartial person or persons*", agreed upon by the union and the accused, or "designated by an independent arbitration or mediation association or board". Legis. His. LMRDA at 270, 605; 2 Id. at 1102. This provision was *deleted* by the Kuchel Substitute in the Senate and the Landrum-Griffin Bill in the House. 2 Ibid. at 1220, 1232, 1694. And see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 872-75 (1960).

In the case at bar the facts were found after a 4-day hearing by a referee whom the District Court held to be "fair and impartial" (App. 50). The action of the IP thereon was affirmed by the IEC, which the District Court held to be "unbiased" (App. 33). In addition, the IEC, on new and additional evidence laid before it by Local 28, expressly upheld the propriety of the IP's conduct of the hearing (Jt. App. 803). In all three hearings petitioners were permitted the unusual privilege of being represented by legal counsel.

of law to interfere with and to overturn the action taken" (App. 49).

"Although the charge was defiance of the orders that the IP had issued, *his actions* in issuing the orders and in their vindication *were official not personal.* * * * it cannot be said that in ordering charges to be brought he was acting to vindicate a personal affront rather than the interest of the Union" (App. 50-1).

"Accepting this finding of some relation between the earlier suits and the IP's actions, we think it *may not be given controlling significance over the array of valid and legitimate motives shown* and the court's unequivocal finding absolving the IP from 'express or particular malice, i.e. ill-will, spite, a grudge, or a desire to be revenged on a particular person or persons, resulting in a deliberate intention to commit an injury.' 203 F.Supp. at 309. It would be a distortion of the record to elevate this factor to a position of pre-eminence, blotting out the permissible reasons for revocation of the charter" (App. 47).

"That the reasons given by the IP for the revocation here are not shams is amply established by the District Court's reservation of the International's right to retry the leaders of Local 28" (App. 48).

"We are of the opinion that, in this industry where there is admittedly close rapport between employers and the union and relatively free mobility between the employer and the employee categories, the activities shown to have occurred during the formation of the new Local [Local 24] cannot be said to have breached a fiduciary obligation owed by the International to the existing Local and its members" (App. 41).

The dissenting opinion

It is submitted that nothing in Circuit Judge Soper's dissenting opinion should tempt this Court to undertake further review of this case. The so-called "narrative" in this brief dissent (App. 78-82) contains at least 14 egregious errors of fact. They make up most of his opinion. They are

not based on "undisputed evidence", as the dissenting Judge claimed; they are not supported by the record; and none of them was even found as facts by the District Court. We must say most respectfully that they disclose no study of, or real acquaintanceship with, the over-1200 printed pages of record, briefs, and District Court opinion. These 14 erroneous statements in the dissent (App. 78-82) are quoted below in italics, with a brief refutation following each of them:

1. *The IP was 'determined to have his own way • • • in those areas in which the local union members were entitled to some freedom of choice".*

(The IP was properly "determined to have his own way" only in having Local 28 (a) end the unjustified and unauthorized strike, and (b) submit those disputes with employers which could not be resolved by collective bargaining at the local level to the Council on Industrial Relations for continued collective bargaining there. Both of these objectives were required by long established IBEW policies. Under the IBEW Constitution these policies were expressly in the IP's province, and not in any area in which the Local had "freedom of choice".)

2. *• • • the Local had much provocation from the IP himself when it ventured to strike without his consent".*

(There is not a scintilla of evidence to support this statement. The IP had made no statement to Local 28, and had taken no relevant action known to Local 28, before Local 28's April 1961 strike or before its June 1961 strike, both of which strikes were without the IP's consent. Local 28 itself has never argued until now that there was any provocation emanating from IBEW for its strikes.)

3. *The "demand of the workers for an increase in wages of 35 cents an hour [was] in place of an increase of 2 cents an hour offered by NECA • • •."*

The initial March 1 wage increase offer by the employers was 2c an hour for 1961 and 2c more for 1962 (Jt. App. 675), but during the collective bargaining, the employers, in five successive stages, increased their

offers until in June, at the time of Local 28's unauthorized strike it was 20c in 1961, 10c more in 1962 and 10c more in 1963 (Jt. App. 538, 539, 920). The District Court found that this final offer "amounted approximately to the same amount of money" as the increased wages obtained by Local 24 in the fall of 1961. If Local 28 had accepted this offer, its wage rate for journeymen today would be $4.25 cents per hour. (Jt. App. 690, 930). During the collective bargaining period Local 28 never deviated from its inflexible demand for an uneconomic increase of 35c which was impossible of attainment. This demand, in all fairness, is to be compared with 20c, not with 2c—which is just 1000% wrong.)

4. *"In this dispute* [*i.e. "for an increase in wages of 35 cents" and "in opposition to the insertion of a 'council clause'"*], *the IP promised the Local his support* • • •."

(The District Court merely found that Local 28 "reasonably felt that it had the support of the International in its efforts *to obtain a substantial increase*" (Jt. App. 20). Never once did the IP, or anyone on his behalf promise support for the Local's "moon-shooting" 35c demand, or intimate, until the conditional revocation order was issued, that this Local might be excused from the IBEW established "policy" for the "Council clause". Indeed, the District Court criticized the IP for not doing the latter (Jt. App. 28).)

5. *"In this dispute* • • • *he* [*the IP*] *in fact worked in harmony with NECA".*

6. *The IP "knew that he had opposed the working employees and favored NECA in the negotiations that preceded the strike."*

(These statements are no doubt intended to describe (a) the IP's statement to NECA in May that "he would do everything he could to see that the Local submit to the Council all issues regarding the terms and provisons of a new contract which could not be resolved by bargaining between the Local and the Maryland Chapter" (Jt. App. 24); and (b) the IP's statement to NECA, in June, *after Local 28's unauthorized strike*, that "he would assist the NECA contractors to obtain union employees" (Jt. App. 27). These obviously

normal and proper statements do not deserve the dissenting Judge's aspersions.)

7. *The IP "tried hard to persuade the Local to adopt the obnoxious clause [the so-called 'evergreen' Council clause] • • •"*

(The findings of the District Court were merely that the IP stated to Local 28's officers "that he wanted any *unresolved issues* to be submitted to the Council" (Jt. App. 26), and "the only way Local 28 could avoid disciplinary proceedings would be to return its members to work and submit all unresolved issues to the Council. He refused to give the Local any assurance that it would not be forced to accept the 'yellow sheet' clause but did not tell of the policy of the Council with respect to that clause" (Jt. App. 28). Never once did he try, "hard" or otherwise, *to persuade* Local 28 to adopt the "evergreen" Council clause.)

8. *The IP "tried hard to persuade the Local • • • to accept a raise of 10c an hour recommended by the IEC • • •."*

(The "IEC" (International Executive Council) made no wage raise recommendation whatever. The CIR (Council on Industrial Relations), so the District Court found, came to a "tentative decision" on May 15 awarding a 10c raise to Local 28 but eliminating any "evergreen" Council clause from its new contract. The IP never once recommended, much less tried hard to persuade it to accept, its suggested raise, or any other wage raise whatever. Furthermore, if there was this so-called "tentative decision", it was kept *confidential* and was never revealed to the Baltimore employers *or even to Local 28* (App. 21).)

9. *The IP "tried hard" to do (7) and (8) "although he was aware that the Local had obtained contracts with a number of independent contractors entitling the workers to an increase in wages of 35c per hour".*

(This statement omits the essential feature that these interim contracts *only conditionally* entitled the workers to an increase of 35c. The District Court clearly found that the interim contracts required the Local "to reimburse the contractors for the differences between the 35c an hour paid under the contract and the wage

ultimately agreed upon by the Local and the Maryland Chapter" (Jt. App. 26).)

10. *"The IP was angry with the union because it would not do his bidding* * * *."*

(The District Court found two instances of the IP's "anger", (a) at the Council meeting in May, because Local 28 failed to attend, although its collective bargaining agreement, and the well-known "policy" of the IBEW, required it to do so; and (b) when the IP revoked Local 28's charter in August 1961 because of some suits which 6 or 7 members of Local 28 had instituted years before, none of which had been tried and and none of which even named the IP as a defendant. The District Court in its decision gave no weight whatever to supposed "anger (a)". It erroneously gave controlling weight to the different, supposed "anger (b)". In neither case had the IP given Local 28 a "bidding.")

11. *The IP "knew* * * *that his own conduct was one of the matters that should be taken into consideration in deciding the case."*

12. *"Indeed, he [the IP] was aware that he ought not to sit in the case* * * *."*

(On the contrary, no question of the IP's conduct or good faith was ever raised by Local 28 until during the argument before the IP on July 28, 1961, weeks after the revocation hearing before the referee and his findings, and three days before the revocation order (Jt. App. 255). It is significant that the complaint filed by Local 28 against the IBEW on July 17, 1961, contained no allegations whatever that the IP was not acting in good faith. It is idle for petitioners to argue (petition p. 3) that Local 28's defense in the revocation proceedings *before the IP* "was based on the impropriety of his own conduct in the matter out of which the charges arose".

13. *"The appeal was taken in this case to the IEC but, as the District Judge pointed out in his opnion, the IEC* * * *[decided the case] upon the record made up by the IP."*

(The District Court "pointed out" no such thing. On the contrary, it found that Local 28's attorney at the

hearing before the IEC "was allowed to read from the depositions of the IP and other witnesses which had been taken for use in the *Parks* case and to challenge the good faith and impartiality of the IP and the members of the IEC in the course of his intemperate and ill-advised argument" (Jt. App. 36). There was no record "made up by the IP", and the record of the proceedings before him could not have included these depositions of the IP and others, which were taken by Local 28 *after* the revocation order. That record could not have included any material bearing upon the IP's conduct and good faith, because Local 28 had made no issue thereof until its argument before the IP on July 28, after that record was closed. Yet the IEC was requested, on the strength of those depositions, to review that question; and it did so, holding expressly "that the International President conducted himself properly is *beyond question*" (Jt. App. 803).)

14. *"This was the only case in which the IP had refused his consent to a strike by a Local union when it desired to strike in order to maintain its position in a legitimate labor dispute."*

(On the contrary, the District Court necessarily found expressly that "Other locals had engaged in strikes without prior consent of the IP" (Jt. App. 28-9). The Court also pointed out, "*Plaintiffs* argue * * * that other locals had engaged in unauthorized strikes * * *" (Jt. App. 37). The record contained numerous instances in which the IP had expressly refused his consent to strikes by other locals (Jt. App. 120, 122, 124). The IP testified to 15 or 20 unauthorized strikes in the past six years (Jt. App. 232) and perhaps a dozen unauthorized strikes at missile bases (Jt. App. 235-6). The important thing is that in all these instances, except for Local 28's unprecedented continued massive defiance, the local either obtained IP consent or returned to work as ordered (Jt. App. 125). The IP testified "I should like to tell the Court that this is the first time to my knowledge that a local union has refused to comply with the Constitution and instructions of the International Office" (Jt. App. 232). The Court of Appeals found, "there is apparently no precedent for the obdurate persistence of this Local after ample warnings" (App. 37).)

REASONS FOR DENYING THE WRIT

Since there was complete agreement between the Court of Appeals and the District Court as to (a) the law, and (b) as to the basic facts, we submit that the petition should be denied under the well-settled "two-court rule". See the host of decisions collected in Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1951), at p. 659, footnote 7. See also Stern and Gressman, SUPREME COURT PRACTICE (3rd. ed.) Sec. 4-14.

The petition utterly fails to establish the existence of any of the usual grounds enumerated in Rule 19 for moving this Court to grant a writ of certiorari at the instance of petitioners.

There is no showing that the Fourth Circuit's decision is in conflict with the decision of any other Court of Appeals on the same matter.

There is no showing that the Fourth Circuit decided against petitioners an important question of Federal law which has not been, but should be, settled by this Court.

There is no showing that the Fourth Circuit, on the merits, decided a Federal question in any way in conflict with applicable decisions of this Court.

Nor is there any showing that the Fourth Circuit in this case has departed from the accepted and usual course of judicial proceedings, as to permit petitioners to invoke an exercise of this Court's power of supervision. Petitioners' real objection is that they do not agree with some of the ultimate factual conclusions of the Fourth Circuit based directly and inevitably upon detailed findings of the District Court, which both petitioners and Court of Appeals have accepted and which petitioners do not challenge here. Although they have attempted in their petition to deck some of these objections out as legal questions, the effort is disingenuous. The legal questions they suggest for review are only those decided in their favor.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

The pertinent provisions of the statutes involved that are not set forth in the petition are as follows:

NATIONAL LABOR RELATIONS ACT, as amended, (NLRA) (49 Stat. 449, 61 Stat. 136).

§ 2(13), 29 U.S.C. § 152(13):

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

§ 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A):

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

LABOR MANAGEMENT RELATIONS ACT (LMRA) (61 Stat. 136).

§ 201(a)(b), 29 U.S.C. § 171(a)(b):

> That it is the policy of the United States that—
>
> (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees,
>
> (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and

maintain agreements concerning rates of pay, hours and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes.

§ 301(b), 29 U.S.C. § 185(b):

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents.

§ 301(e), 29 U.S.C. § 185(e):

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT (LMRDA) (73 Stat. 519):

§ 3(o), 29 U.S.C. § 402(o):

"Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

§ 101(a)(1), 29 U.S.C. § 411(a)(1):

Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

§ 101(a)(2), 29 U.S.C. § 411(a)(2):

Freedom of speech and assembly.—Every member of

any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organizations his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 8649—John E. Parks, Jr. et al. v. International Brotherhood of Electrical Workers, etc.

Insert as the first full paragraph on page 38 of the slip opinion, the following:

It is noteworthy that in the initial drafts of the bill that became the Taft-Hartley Act (LMRA), provisions were included in both Houses that would have either prohibited industry-wide bargaining or explicitly guaranteed to local unions the right to conduct their own collective bargaining entirely free from international interference. There was extensive debate on these proposals. A strong provision prohibiting industry-wide bargaining was passed in the House of Representatives. In the Senate Committee on Labor and Public Welfare restrictive provisions were eliminated from the Senate bill. When the bill reached the floor, attempts to reinstate such a provision by amendment were defeated. In conference the House yielded to the Senate. Consequently no such restrictive provisions were enacted. See references under "Industry-wide Bargaining," in the Topical Index to the *Legislative History of the LMRA* at p. XXXVI.

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

No. 885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JOHN E. PARKS, JR., AND ROBERT M. FOOTE AND ALBERT McHUGH AND PAUL ZIEGLER AND SILVIO STAMERRO, INDIVIDUALLY AND AS REPRESENTATIVES OF THE MEMBERS OF LOCAL 28, IBEW, IN A CLASS ACTION AND LOCAL UNION 28, IBEW,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND LOCAL UNION NO. 24 (IBEW),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR LOCAL UNION NO. 24 (IBEW) IN OPPOSITION

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Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. Sec. 401, et seq. 10, 11, 12

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 1-46) is reported at 203 F. Supp. 288.

The opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1-78) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1963. The petition for writ of certiorari was filed on March 1, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE SALIENT FACTS[1]

Local Union 28 and certain of its members instituted suits against its parent organization, the International Brotherhood of Electrical Workers (hereinafter referred to as the IBEW) to invalidate the revocation of its charter by the IBEW. The revocation action had been taken after (a) Local 28 went out on strike without obtaining the sanction of the IBEW International President (IP) as required by the IBEW Constitution and (b) refusal of the members of Local 28 over a six weeks period to return to work and end the strike in defiance of the repeated directions of the IP to do so.

The Constitution of the IBEW, which was binding upon every Local and every member of the Union, provided that no Local could cause or allow a work stoppage or a strike without the consent of the IP (XVII, 13; Pet. App. 8). The IP was empowered by the Constitution to decide disputes and questions in controversy however arising, provided that his decisions were subject to appeal to the IEC and then to the International Convention (IV, 3(2); Pet. App. 8). The IP was also empowered by the Constitution to suspend or revoke the charter of any Local which failed or refused to observe the laws and rules of the IBEW (IV, 3(8); Pet. App. 8).

---

[1] This statement attempts to recite only the critical facts. The opinion of the Fourth Circuit contains a more detailed review of the facts.

Local 28 voted on June 13, 1961 to strike on June 16 at 4:00 P.M. against the Maryland Chapter of the National Electrical Contractors Association (NECA). When later informed of the vote by telegram, the IP replied by telegram on June 15 refusing his strike sanction; his refusal was received by the Local before the strike had begun.[2] Nevertheless Local 28 went out on strike as scheduled. At a meeting of the Local on June 22, at the insistence of the IP, his telegram was read and, in accordance with the recommendation of the Local's officials, the Local voted to continue the strike (Jt. App. 283-284; 647-648; 26-27; 691-692). The local did not advise the IP of this vote until he asked to be informed (Jt. App. 797). The Local took no appeal to the IEC from the IP's refusal to sanction the strike.

On June 23 the IP was advised that the members of the Local had refused to discontinue the strike in spite of his disapproval. The IP sent a representative to Baltimore to discuss the problem, investigate and report (Jt. App. 289-290). On July 7 the IP, in a communication to officials of the Local, characterized its action as a challenge to the authority of the International and the IBEW Constitution (Jt. App. 722). On the same day he sent each member of the Local a notice of a hearing before a referee on July 7 to show cause why the Local's charter should not be revoked for engaging in a strike in violation of the IBEW Constitution (Jt. App. 731-734; 927). On July 14 the IP wrote each member a second time, explaining the effect of the charter revocation and enclosing a copy of the IBEW Constitution (Jt. App. 735-737).

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[2] The IP refused to sanction the strike because he deemed Local 28's demands were excessive. The Fourth Circuit held that his refusal was not a breach of his fiduciary duty (Pet. App. 35).

At a four day hearing before the referee pursuant to notice, the referee took extensive evidence (Jt. App. 737) and thereafter submitted his findings of fact (Jt. App. 751-755). The referee found the facts to be "crystal clear" that Local 28 had called the strike without making any attempt to obtain the approval of the IP and had continued it in disregard of his constitutional authority[3] (Jt. App. 35).

On July 28 the IP heard extensive arguments of counsel for Local 28 (Jt. App. 755-756). Near the end of the arguments for the first time counsel for Local 28 questioned the good faith and impartiality of the IP in bringing the charges; they did not move to have the case transferred to the IEC on this ground. On August 1 the IP filed his decision and order and sent a third letter to each member of the Local enclosing his decision and explaining it at length (Jt. App. 757-765). He ordered the revocation of the charter of Local 28 unless by August 7 (a) each of its members reaffirmed his oath as a member of IBEW, (b) the Local terminated its unauthorized strike, (c) the Local submitted the issues in dispute between Local 28 and the employers to the Council on Industrial Relations (a joint IBEW-NECA bargaining agency) for binding decision, provided the Local need not accept the usual Council clause[4], and (d) the officers of Local 28 notified the IP of the action taken.

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[3] The District Court found the referee to be "a fair and impartial man" (Jt. App. 35).

[4] Most collective bargaining agreements between IBEW locals and NECA chapters contained some form of Council clause. The clauses generally required submission to the Council for decision of all disputes arising during the term of the agreement and proposed changes at the end of any contract year when they were in dispute (Pet. App. 11). Most Council clauses provided that the agreement was to run from year to year unless changed as provided in the agreement. Such agreements were termed "evergreen", namely, terminable only upon mutual consent of the parties or permission of the Council. The Dis-

On August 5, in spite of the IP's directive, the members of the Local voted overwhelmingly to support their officers in continued defiance of the IP's orders, to refuse to accept his reasonable alternative requirements and to continue the strike. Instead the Local filed an appeal to the IEC from this decision of the IP and then took the lengthy depositions of a number of witnesses, including that of the IP.

On September 12 the IEC heard extensive arguments of counsel for Local 28 on its appeal and its counsel were permitted to read from the depositions of the IP and other witnesses and to challenge the good faith and impartiality of the IP as well as the members of the IEC. Although deemed an appeal by the Constitution, the IEC permitted counsel for Local 28 to treat the proceeding as a hearing *de novo* (Jt. App. 30, n. 30). The IEC accorded Local 28 this hearing although the Local had refused to comply with the decision of the IP pending the appeal as required by the Constitution as a condition of such appeal (IV, 3(2), XXVII, Jt. App. 16).

On September 30, 1961, the IEC decided the case not only on the basis of the record before the IP but also on the facts submitted in the interim depositions, including those relating to the IP's impartiality, extensive oral argument and written briefs (Jt. App. 764-795). The IEC affirmed the order of the IP revoking the charter of Local 28 in an extensive opinion[3] (Jt. App. 795-804). Its findings included:

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trict Court held that the validity of the Council clause in this case was not involved (Jt. App. 39). The Fourth Circuit held that it was not called upon to determine under what circumstances a perpetual agreement between a union and an employer may or may not be enforceable (Pet. App. 46).

[3] The District Court found that the IEC was not biased and not prejudiced against Local 28 (Pet. App. 33, 49).

"The International President acted with remarkable restraint and patience. He advised . . . He met . . . His every efforts were rebuffed.

* * *

"That the International President conducted himself properly is beyond question. . . . Not once, during these entire procedures did the Local Union indicate a willingness to comply with the laws of this organization. The International President, even in his decision and order . . . extended a final offer to forestall the revocation of its Charter. Local 28 chose to ignore the offer.

* * *

"All that was presented by Local 28 to the International President, all that has been presented by Local 28 to this Council on appeal, is that it be permitted to conduct its affairs outside of the restrictive provisions of the laws of the International Union. That it cannot do" (Jt. App. 803).

After Local 28 determined to go its own way without reference to the Constitution and laws of the IBEW, the IBEW proceeded to lay the ground work for the formation of a new Local and on August 27 assisted in the chartering of this Respondent, Local 24, and has thereafter aided it. On March 30, 1962, Local 24 had some 1300 members, a number which equals or exceeds the membership of Local 28. In contrast to Local 28 which has been a closed union, Local 24 is an open union which has accepted all applications for membership by qualified electricians in the Baltimore area, including some hundreds of transferee members from Local 28 (Pet. App. 29).

In spite of the District Court's findings that (1) the IP owed a duty to the Union as a whole and he could not properly grant permission to engage in a strike which he felt would be contrary to the best interests of the IBEW

(Jt. App. 38), (2) the IP acted "to maintain necessary union discipline" (Pet. App. 34), and (3) the IP was not moved by express or particular malice, ill-will or bias, the District Court held the IP did act wilfully and intentionally for the purpose of imposing severe discipline on the members of Local 28 and in that sense "his action amounted to legal malice". The District Court concluded that, since counsel for Local 28 had challenged the good faith of the IP and his motives in refusing consent to the strike, he had been disqualified from hearing the case and was not "an unbiased and disinterested tribunal" (Jt. App. 35). Yet Local 28 had not appealed to the IEC from the IP's refusal to sanction the strike. The Court further held that "the fatal defect in the procedure" was not corrected by the review of the IP's decision by the IEC (Jt. App. 36). In invalidating the proceedings upon the grounds stated, the Court disregarded the organizational procedures of the IBEW Constitution.

After finding that the IP had no actual malice toward Local 28, the Court said: "But he did act wilfully and intentionally for the purpose *inter alia* of imposing severe discipline on the members of Local 28 and without due regard for the duty he owed to them, as well as to the IBEW as a whole. In that sense his action amounted to legal malice" (Jt. App. 38-39).

In detecting a procedural defect in the hearing accorded Local 28 by the IP, i.e., the hearing was not a fair one because the IP should have disqualified himself, not by reason of actual bias against Local 28, but by reason of his "legal malice", (a concept so abstruse that a layman officer of a labor organization could not reasonably be expected to identify it and act upon it) the District Court applied a subjective "mixed motives" test to disqualify the IP which, if accepted, could disqualify any judicial, quasi-

judicial, administrative or organizational officer because each of them necessarily acts "wilfully and intentionally" in making a decision. The vice of the test was that it depended upon the decision pronounced. The Fourth Circuit was correct in rejecting it.

The District Court did not accord IBEW any opportunity to correct the alleged procedural defect. After finding the hearing procedure defective, the District Court enjoined the IBEW from holding any new hearing with respect to its charges against Local 28.[6]

The District Court further held that the new Local 24 was dominated by IBEW and directed the revocation of its charter, although upon the revocation by IBEW of the charter of Local 28, it was natural for the loyalist members of the Union, who wished to retain their membership in the IBEW, to seek continued membership by forming a new IBEW local union. This they did with the cooperation and assistance of IBEW. In doing so, they exercised a federal right guaranteed by Section 7 of the National Labor

[6] This novel determination struck a crippling blow to the autonomy and self-government of the IBEW and other national and international labor organizations. It exceeded the Court's authority and violated fundamental principles of judicial review of administrative and organizational proceedings.

Instead of reversing the revocation order, if deemed defective, without prejudice to further proceedings by IBEW in consonance with the opinion, as required by established state and federal governing review of administrative and organizational proceedings, the District Court proceeded to determine itself whether the charter of Local 28 should be revoked and concluded, without applying any legal standards except the length of the chancellor's judgment, that revocation was too severe a sanction. In thus functioning as the ultimate review agency of IBEW, and making its own findings with respect to the dispute between Local 24 and the IBEW, the District Court set aside the autonomous self-governing processes of the IBEW. As the amicus brief of AFL-CIO in the Fourth Circuit pointed out, such a decision had serious implications for the independence of trade union organizations.

Relations Act. The IBEW also had a recognized federal right to form, or participate in the formation, of its locals. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 234.

Although Local 24 and its members had not been made parties in this litigation by court order or otherwise, the District Court's order prejudiced substantial rights of Local 24 and all of its members. Without any hearing being accorded by the District Court to Local 24 and its members, the Court adjudicated their valuable and beneficial rights in their absence. It was a denial of civil liberties for a court to destroy a union and the rights of its members in their absence.

Upon petition to the Fourth Circuit, Local 24 was made an intervening appellant by court order. If certiorari is granted Local 24 reserves the right to contend that as to it the District Court's order violated due process.

In the elaborate opinion of Chief Judge Sobeloff, the Fourth Circuit reversed the decision below after reviewing the facts in more detail than is possible here[7] and holding that on the facts as established by the District Court's findings there was no procedural defect in the trial before the IP (Pet. App. 49). The Fourth Circuit rejected all of the defenses advanced by the IBEW and Local 24 based upon lack of jurisdiction of the District Court over this intra-union dispute (Pet. App. 54-76). (For a statement of these jurisdictional defenses see pages 10-11 of this brief.)

[7] For instance, this brief does not attempt to deal with the complexities of the so-called "evergreen" clause. It is discussed fully in the opinion of the Fourth Circuit (Pet. App. 42-46).

ARGUMENT

I. The Issues Raised by the Petition Violate Supreme Court Rule 23(4).*

Petitioners have failed to present with accuracy, brevity and clearness whatever is essential to a ready and accurate understanding of the points requiring consideration. The questions presented contain numerous assumptions of fact which, as shown in the brief for the IBEW in opposition, are inaccurate. These questions also contain so many subsidiary clauses that the questions are lengthy, obscure and extremely difficult to comprehend. If a petition for certiorari can be deemed to violate Rule 23(4), the issues presented in this petition would appear to do so. For this reason alone the petition should be denied.

II. Almost Every Legal Issue Presented by the Petition Has Been Decided in Favor of Petitioners

Almost every important legal question was resolved by the Fourth Circuit in favor of petitioners so they are not entitled to complain here of the rulings made below in their favor. The Fourth Circuit held with petitioners that:

(1) The Federal Courts had jurisdiction over this suit by a local union against its International because (a) the constitution is a "contract . . . between . . . labor organizations" within Sec. 301(a) of the Taft-Hartley Act (Pet. App. 54-59) and (b) members of a local union, whose charter is revoked by an International, are "disciplined" by such revocation within the meaning of Sec. 101(a)(5) and 609 of the Landrum-Griffin Act (Pet. App. 66-69).

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*Rule 23(4) of the Supreme Court Rules states:
"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

(2) The Norris-LaGuardia Act[9] did not preclude injunctive relief in a case instituted under Sec. 301(a) of Taft-Hartley and therefore Norris-LaGuardia did not deny the District Court authority to issue an injunction in these proceedings (Pet. App. 60-64).

(3) Although the complaints of petitioners charged in part unfair labor practices, the doctrine of NLRB primary jurisdiction did not require the District Court to defer to the exclusive jurisdiction of the Labor Board as to the other charges of the complaints (Pet. App. 64, 65, 70).

(4) The failure of petitioners to exhaust the reasonable internal remedies available to them did not bar the suits (Pet. App. 74-76).

Each of these important legal questions has been determined favorably to petitioners and accordingly their attempt to have them reviewed here is improper. (See Questions Nos. 8, 9, 10 and 11, Pet. Brief, pp. 4, 5).[10]

The only legal issues which were not resolved below in favor of petitioners were these:

(1) Did the Court below err in holding that the revocation of Local 28's charter and the immediate chartering of new Local 24 for the same jurisdiction did not constitute a trusteeship as defined by Sec. 3(h) of Landrum-Griffin? (Petitioners' Question No. 4). Petitioners reason that the trusteeship provisions of Landrum-Griffin were thus violated and therefore the District Court had jurisdiction over their suits. Since both Courts below held that the District Court had jurisdiction over the suits under both Sec. 301(a) of Taft-Hartley and Sec. 101(a)(5) and

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[9] 29 U.S.C. Sec. 101, et seq.

[10] In the event the petition is granted, Local 24 reserves the right to argue that each of these legal issues was incorrectly decided below.

609 of Landrum-Griffin, the decision as to the trusteeship question is hypothetical and of no importance. Only if the Fourth Circuit had determined that the District Court had no jurisdiction of these suits under Taft-Hartley and under Landrum-Griffin would this question have been pertinent. Furthermore, the decision of the Fourth Circuit that the trusteeship provisions of Landrum-Griffin did not apply was plainly correct for the reasons stated in its opinion (Pet. App. 71-73).

(2) Did the Courts below err in declining to make findings as to charges by petitioners of unfair labor practices on the ground that such charges were within the exclusive primary jurisdiction of the NLRB (Petitioners' Question 5)?[11]

The District Court at the trial admitted in evidence, subject to exception, all testimony proffered by petitioners in their effort to show unfair labor practices and that there was a conspiracy between the IBEW and the employers (NECA). Near the end of the trial the Court indicated that petitioners had offered no evidence of any such collusion or conspiracy, saying, "There has not been the slightest suggestion of that in the evidence" (Jt. App. 315). It is apparent that, if the District Court had made findings as to matters which plainly involved unfair labor practices subject to the exclusive jurisdiction of the NLRB, they would have been adverse to petitioners.

Petitioners may not complain of the failure of the courts below to make findings of fact tantamount to unfair labor practices. In the District Court petitioners did not request such findings in their elaborate "Request for Findings". In

[11] Petitioners charged that the International President made a secret deal with the employers (NECA) and thereby prevented Local 28 from successfully bargaining (Pet. Brief, p. 2, Their Question 5).

the Fourth Circuit they defended the failure of the District Court to make such findings (Pet's. Brief in the Fourth Circuit, pp. 76-77).

III. The Principal Factual Questions Decided Below

(1) Was the refusal of the IP to consent to the strike of Local 28 made in bad faith? The Fourth Circuit and the District Court found as a fact that he acted in good faith in his refusal to authorize it (Jt. App. 35). This finding was amply supported by the record. In addition Local 28 did not appeal his refusal to the IEC.

(2) Was the revocation hearing unfair because allegedly the IP was not impartial and unbiased? The District Court concluded that, in revoking Local 28's charter as he was empowered to do under the IBEW Constitution, the IP had no actual bias against Local 28 but, since he wilfully imposed severe discipline upon the members of Local 28, his action amounted to "legal malice," and therefore he was disqualified in hearing the case. (For a more complete statement of the District Court's findings on this point, see page 7 of this brief.) In its elaborate opinion the Fourth Circuit concluded that "on the facts in this case as established in the Court's findings" there was no procedural defect in the trial before the IP justifying a court of law to interfere with, and to overturn, the action taken" (Jt. App. 49). This finding was clearly correct for the reasons set forth in the opinion of the Fourth Circuit.

IV. The comprehensive opinion of Chief Judge Sobeloff on behalf of the Fourth Circuit has disposed of the issues in this case and there is no need for further review by this Court.

No constitutional question has been raised by petitioners and they are unable to contend that the decision of the

Fourth Circuit is in conflict with any decision of this Court or of any other Circuit. Nor has any substantial and important question of federal law been decided adversely to petitioners.

Petitioners' abstruse contentions are clearly without merit. The principal factual issue below was whether the IP was biased and therefore disqualified from hearing the charges that Local 28 had violated the Constitution of the International. This was an issue of fact which has been correctly resolved by the Fourth Circuit against petitioners upon the basis of the findings of fact of the District Court.

This case turns solely upon an analysis of its particular facts and this Court does not grant certiorari "to review evidence and discuss specific facts". *United States v. Johnston*, 268 U.S. 220, 227; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508; *Houston Oil Co. v. Goodrich*, 245 U.S. 440. The facts themselves are so unique and episodic, they have never risen before and are unlikely to arise again.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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March 1963.

Office-Supreme Court, U.S.
FILED
APR 6 1963
JOHN F. DAVIS, CLERK

No. 885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JOHN E. PARKS, JR., AND ROBERT M. FOOTE AND ALBERT McHUGH AND PAUL ZIEGLER AND SILVIO STAMERRO, INDIVIDUALLY AND AS REPRESENTATIVES OF THE MEMBERS OF LOCAL 28, IBEW, IN A CLASS ACTION AND LOCAL UNION 28, IBEW,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND LOCAL UNION NO. 24 (IBEW),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Introduction

Respondents repeatedly concede that both the courts below have agreed as to the basic evidentiary facts (IBEW Br. in Opp. 2, 24, 33). The questions presented by the petition for certiorari involve only the legal consequences of these established facts in the light of the interpretation of controlling federal statutes of the greatest public importance. Nevertheless, Respondents have attempted to

divert attention from these fundamental issues, which require no re-weighing of the evidence, by a volley of strident and utterly baseless attacks on the fairness and accuracy of the Statement of the Case in the petition and even in Judge Soper's dissenting opinion. In this effort, the briefs in opposition, particularly that of the IBEW, have regrettably failed to meet the standards of fairness and candor required of officers of this Court. Following is a brief documentation of some of Respondents' more salient misstatements and distortions and an assessment of their effect on the issues.

(1) *The Nature of International's Fiduciary Obligation Under Landrum-Griffin.*

The authoritative definition of the content of International's fiduciary obligation is one of the primary legal issues in this court. Respondents concede that the IP stated "to NECA in May [1961] that 'he would do everything he could [which necessarily included full exercise of his strike sanction power and other powers under the IBEW Constitution] to see that the Local submit to the Council all issues regarding the terms and provisions of a new contract which could not be resolved by bargaining between the Local and the Maryland Chapter' " (IBEW Br. in Opp. 29). This commitment was given after the agreement on the 10¢ wage increase had been reached in the Local's absence by the Council, and while the Local members were at work (App. 20-21). It was concededly not communicated to the Local, which so far as it knew was engaged in free bargaining with NECA's Maryland Chapter.

This commitment alone, under the circumstances, was sufficient to prevent free collective bargaining in Baltimore and thus to provoke the strike because "it is important to recognize that the possibility of a strike is a necessary

counterpart to free collective bargaining and an important element, even though well in the background, in the process of reaching agreement".[1]

The IBEW argues that such a commitment by the IP under the circumstances was "obviously normal and proper" (IBEW Br. in Opp. 29-30). Respondents' argument is thus premised here, as it was below, on a "challenge, [to] the legal basis" of Petitioners' position as to the content of the IP's fiduciary duty, the ground of the challenge being that this duty "is in no sense a duty comparable to that which exists between a trustee and a cestui que trust" (IBEW Reply Brief in 4th Cir. 4 n.). Respondents' basic premise, adopted by the majority of the Court of Appeals, squarely conflicts with the declared purpose of Congress to incorporate the general principles of fiduciary law into the labor field. The problems of burden of proof and content of the fiduciary obligation not only in respect to the above quoted commitment, but all the other conduct summarized at pp. 24-28 of the petition for certiorari are important legal problems, which Respondents' briefs, like the decision of the Court of Appeals, glosses over in silence. The important fiduciary provision of Landrum-Griffin can be given life only by application in representative specific cases such as the case at bar. Only by this Court's insistence in a case such as this upon sympathetic enforcement of the congressional purpose, as disclosed both by the language and legislative history of the Landrum-Griffin Act, may the rights of union members secured by that Act be given meaningful protection. The instant case itself is an example of why the necessary guide lines should be authoritatively laid down as promptly as possible.

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[1] Committee for Economic Development, The Public Interest in National Labor Policy (1961) 86, quoted in Brief of AFL-CIO as amicus in the 4th Circuit, pp. 11-12.

The following are the most salient mis-statements and distortions in the brief of respondents relating to the issue of breach of fiduciary obligation.

1. Respondent IBEW unblushingly argues that the 10¢ increase which the IP bargained in the Council knowing that the Maryland Chapter had discussed "far more substantial offers" (App. 20) was not unreasonably low (IBEW Br. in Opp. 23). Chief counsel for the IBEW was more candid when he conceded in the District Court that such an agreement by the IP "wasn't doing a very good job for labor" (Jt. App. 381). There is not a word in the briefs in opposition in explanation of this concession. Indeed the briefs gloss over in silence the mass of evidence which forced the concession, as well as the District Court's findings that the Council's action with respect to the Local on May 15th was unreasonable (Jt. App. 40, n. 44, 46). The IBEW brief contents itself with a reference to the one or two scraps of evidence in the case which might provide comfort to Respondents, if the case were now being argued for the first time before the fact finder.

2. Respondent IBEW asserts as a fact that the draft decision of the Council providing for a 10¢ increase was never communicated to the Baltimore employers (IBEW Br. in Opp. 4). The District Court however, found specifically that respondents had failed to prove such lack of communication, as Petitioners had failed to prove the contrary (Jt. App. 23); and one of the questions in this Court, in view of the general principles of fiduciary law sought to be incorporated into the labor context by Congress in Landrum-Griffin, is where the burden of proof lies. See the discussion and citations at p. 25 of the petition, all of which is met merely with silence by the briefs in opposition.

3. In the midst of what purports to be quotations from the District Court opinion, respondent IBEW asserts

(IBEW Br. in Opp. 11) that the Local's "so called collective bargaining in 1961" was unreasonable. The District Court however found that "there was no such unfair bargaining by the Local as would justify denial of the relief which will be granted in this case" (Jt. App. 42).

4. Respondent IBEW charges petitioners with an "outrageous mis-statement" to the effect that the District Court stated that the IP was "in league with the wolves in the establishment of Local 24" on the ground that the colloquy cited in support of the petitioners' statements shows that the District Court "was merely posing a rhetorical question, i.e. whether Freeman was acting as a good shepherd or whether he was in league with the wolves" (IBEW Br. in Opp. 24). Without characterizing the statement of respondent, it is sufficient to set forth the court's comments:

> "(The Court) Except they were so much the other side that you couldn't even give nem a charter. The people you had been dealing with in the organizing of the new Local were Vice-President of employers and you couldn't give a charter to the Vice-President of the employers . . . The idea that those men were really going to represent the rank in [and] file is too much . . . I think organizing a new Union after August the 1st, there is nothing wrong about that. I think the only question that goes into the issue of whether Freeman was acting as a good shepherd or whether he was in league with the wolves is the question; that he appoints wolves or collaborates with wolves in organizing the new local. I think that is the point and that carries back as reflecting his attitude" (Jt. App. 592-93).

The final opinion of the District Court also clearly indicates that the court was not posing a rhetorical question (Jt. App. 30-1).

5. Respondents deny that the Local and its leaders had successfully sued International (IBEW Br. in Opp. 5), and, in the course of purported quotations from the District Court opinion, assert that none of the court actions involved the IP personally or was important (IBEW Br. in Opp. 17). Respondents however do not deny that only after request to the International for action was turned down and the suits were brought and nearing trial did the Local obtain from the International the full relief prayed. The Respondents' briefs failed to do justice to the District Court findings as to unreasonable high-handedness of the IBEW in the earlier relations between the parties, or to discuss the undisputed evidence of Freeman himself as to his deep-rooted hostility to intra-union litigation notwithstanding the Landrum-Griffin Act, which he "hated", and the relentlessness with which IBEW disciplinary procedures followed reasonable assertions of the Local's rights. These facts, in light of the District Court's advantage of seeing and hearing the witnesses and of Freeman's conduct in failing to disclose to the Local prejudicial arrangements made by him behind the Local's back in collaboration with the adversary, fully support the District Court's findings as to the extent to which the IP's improper reasons were an ingredient of his "mixed motives" sufficient to vitiate the revocation (See Petition for Certiorari 9-10, Jt. App. 18-19 and n. 21).

6. Local 24's brief in opposition (p. 13) makes the astounding statement that the District Court found as a fact that the IP acted in good faith in refusing to authorize the strike, citing Jt. App. 35, where the only reference to good faith was that the IP should not have sat in judgment on the Local because "the propriety of his own action and his own good faith and motives in refusing consent to the strike and in preparing, filing and pressing the charges

were being called into question" (Jt. App. 35). Nowhere did the District Court find that the IP acted in good faith. In fact, for the reasons set forth in the petition the IBEW brief in opposition is in error in quarreling with petitioners' reading of the District Court opinion as having found the IP guilty of bad faith (IBEW Br. in Opp. 9).

7. Respondents emphasize out of proper perspective the District Court's finding that the IP did not bear any ill will or express particular malice against leaders of the local. The IP hardly knew the leaders personally and hence had no such feelings against them based on their individual personalities. However, the District Court was correct in concluding that the IP was guilty of legal malice in his motivation to punish the local for what the leaders had done in asserting their rights, particularly in the courts.

8. Respondents assert as a fact that the District Court found the local's request for a wage increase of 35¢ "unrealistic". Actually, the District Court did not so find. His finding was that such an increase would have brought the wages in Baltimore in line with the wages in near-by cities although it "*may have been* unrealistic" in view of the non-union situation in Baltimore (Jt. App. 25, n. 24). In any event the IP's misconduct can not be excused even if the Local's wage request were to be found unrealistic. In this case, the IP did not tell the Local before the strike vote that he disagreed with the local; instead he told the adversary and then he never told the local that he had done so.[2] Moreover, as the District Court pointed out, even

[2] Supporting the Local's figure is the Local's success in signing at least a dozen contractors at 35¢, the 50¢ increase over a two year period granted to Local 24 and the fact that the key sector of the electrical industry which according to Professor Dunlop is the sector material in the determination of wages, according to the uncontradicted evidence, is 80% unionized in Baltimore (App. 6, n. 3, Jt. App. 509).

if the IP's flock can be said to have erred in the negotiations, he is still bound by his abiding fiduciary obligations under Landrum-Griffin; even in chastisement he must be a good shepherd.

(2) *The Legality of the IP's Conduct in Regard to the Perpetual Council Clause.*

Nothing in Respondents' brief meets petitioners' argument as to the importance of the resolution of this issue by this Court. Respondent IBEW, by lifting out of context one passage of the District Court opinion, argues that the question is not really presented because the IP never had any intention of imposing a council clause on the local (IBEW Br. in Opp. 12). The Court of Appeals, however, notes that the District Court "intimated that the IP was so committed" (App. 42, n. 32, citing 203 F. Supp. at 298, 302, n. 27, 304; see also Jt. App. 382, 483) and the Court of Appeals, assuming such commitment by the IP, directly considered the legality of his objective and upheld it as legal and proper. This important legal question is thus squarely presented here.

In the last analysis, the IBEW admits that the objective of the IP was to force the local to the Council (IBEW Br. in Opp. 28). Nor do respondents deny that both courts below found that the Council had adopted a secret resolution, (of which, the evidence shows, the IP was a prime mover) to re-write the applicable contract between the submitting parties to include the strict evergreen clause in every case where, as here, one party wished to terminate and the other did not. Keeping this resolution a secret from the locals, which were entitled to consider it in drafting their contracts and determining whether to submit disputes to the Council, was itself a striking violation of the IP's fiduciary obligation and an attempt by stealth

to supplant the locals as collective bargaining agents for their members.

Respondents seek to defend the IP on the basis that he was merely carrying out the IBEW's well known policy in favor of the Council.[3] However, the CIR has been proclaimed as a voluntary tribunal clothed with no mandatory power which does not infringe on local collective bargaining, and the announced policy of the IBEW has been one of encouragement and not compulsion to submit local disputes to the Council (Jt. App. 16).

The Courts below agreed that Local 28 was the bargaining agent in its jurisdiction. The Federal statutes protect the rights of employees in the bargaining unit to choose their own representatives (Landrum-Griffin Act, §2, 29 U.S.C.A., Sec. 401; N.L.R.A. §9(a); 29 U.S.C.A., §159(a)).[4]

The International was never designated for this purpose. The IP had no right to go beyond the well publicized IBEW policy of voluntarism regarding the Council in order to supplant forever Local 28 as collective bargaining agent

[3] The IBEW also argues that the IP was justified in being angry at the Local for failure to attend the Council meeting of May 15th because the Local's collective agreement required its attendance (IBEW Br. in Opp. 31). The argument fails to allude to the fact that the District Court opinion in the instant case in terms too clear for misunderstanding, expressly rejected the argument, and stated that the Court, before the meeting on May 15th, had already announced its decision that the agreement between the Local and the Maryland Chapter did not require submission of their dispute to the Council and had been effectively terminated as of March 31st (Jt. App. 21, 37-8, n. 43).

[4] The majority decision of the Court of Appeals rests on the false premise that the International is the repository of all powers and the Local has only such powers in the area of collective bargaining as the International expressly accords to it (App. 37). This premise directly conflicts with the statutory provisions above cited which give control over the designation of the exclusive collective bargaining agent to "the majority of the employees in a unit" (29 U.S.C.A., Sec. 159(a)).

for its members. Only unmistakably clear and express language in union constitutions would justify a construction that an International union may compel the local's members to accept bargaining on a permanent basis by representatives not of their own choosing. The fact that Taft-Hartley rejected a proposal to prohibit all industry-wide bargaining does not justify the construction of the law urged by respondents and adopted by the majority of the Court of Appeals, which would permit an International, regardless of express constitutional provisions providing for a degree of local autonomy and declarations of International Conventions as to the voluntary character of submission of disputes to an agency such as the Council, to claim existence of an unpublicized policy as justification for an effort to take over bargaining for local members and completely and permanently destroy local autonomy thereby. The decision below is a threat to the rights of virtually every rank and file member in the American Labor movement. If that decision stands, Landrum-Griffin is merely a futile gesture.

(3) *Full and Fair Hearing*

Respondents have submitted on this issue (IBEW Br. in Opp. 17, 20-22, 31) a melange of quotations from earlier litigation dismissed by the District Court, on motion, *without prejudice* (Jt. App. 15), as to which IBEW's counsel conceded below that he was not claiming any estoppel (Apx. 5),[5] and of argument foreclosed by the findings of fact of both the courts below as set forth in the majority opinion of the Court of Appeals, in the following language:

> "The District Court without passing on the question of whether the IP had the authority to decide this case, held 'it was one which he should have referred to the IEC or some other impartial tribunal . . ., [as] the propriety of his own action and his own good faith and

[5] This reference is to the supplemental appendix filed with appellees' (petitioners') brief in the Court of Appeals.

> motives in refusing consent to the strike and in preparing, filing and pressing the charges were being called into question.' 203 F. Supp. at 307. This supposed defect was held not to have been cured by review by the IEC. Although the court found that the IEC was not prejudiced, it held that the review was in the nature of an appeal, not a trial *de novo*. We do not agree that, on the facts in this case as established in the court's findings, there was a procedural defect in the trial before the IP justifying a court of law to interfere with and to overturn the action taken" (App. 49).

In the light of these findings, it is highly misleading for Local 24 to represent to this Court in its "statement of the Salient Facts" in its brief in opposition (p. 5) that "although deemed an appeal by the Constitution, the IEC permitted counsel for Local 24 [28] to treat the proceedings as a hearing *de novo*." It is simply incomprehensible how the IBEW can argue that "It is idle for petitioners to argue . . . that Local 28's defense in the revocation proceedings *before the IP* 'was based on the impropriety of his own conduct in the matter out of which the charges arose'" (IBEW Br. in Opp. 31), especially when the IBEW conceded (Ibid) that the point was raised in argument before the IP, which was the first time in the proceedings that the Local could confront the IP since all the evidence had been taken by a referee. The record before the referee establishes that the Local's opening statement stressed as "the primary issue" the charge that the IBEW was colluding with the employers and attempting to force on the Local a perpetual council clause (Joint App. 740-41), and that the Local tried unsuccessfully to call Freeman as a witness to testify as to "why he is charging the Local Union and what he is charging the Local Union with and the reasons for it (Jt. App. 743) . . . to establish just what their proceedings have been through the years and especially

to establish the fact that they have allowed even work stoppages of a general nature without requiring the approval of the International President" (Jt. App. 751).

(4) *The Refusal Of The District Court To Make Findings That The Maryland Chapter Of NECA Was Guilty Of Bad Faith Bargaining And That The International Was Guilty Of Violations Of The Union Constitution Which Were Also Prohibited By The Unfair Labor Practice Provisions Of The NLRA.*

The District Court expressly refused to decide whether the Maryland Chapter of NECA was guilty of lack of good faith in the bargaining with the local, whether the IBEW conspired with and encouraged the Maryland Chapter not to bargain fairly, and whether the IBEW attempted to coerce members of the Local in the exercise of their collective bargaining rights protected by the NLRA (App. 65, n. 58), although these findings were relevant to the issue of whether International had violated the union constitution. Respondents claim that the question with respect to the propriety of the District Court's refusal to make a finding on these matters (No. 5 of the "Questions Presented" in the petition for certiorari) is not open in this Court because "petitioners did not suggest such a finding in their elaborate 'request for findings' made to the District Court. Furthermore, in the Court of Appeals, they defended, and praised as 'careful', the failure of the District Court to make this finding, arguing that, since all the evidence bearing on the IP's conduct and motivation was admitted, the failure so to characterize it was not 'crucial'" (citing petitioners' brief in the Fourth Circuit at pp. 76-77; see also, Local 24 Br. in Opp., pp. 12-13, to the same effect).

It is clear enough from the District Court's opinion that petitioners made perfectly clear to that court their desire

for the findings which the District Court expressly refused to make. As to the respondent's representation with regard to petitioners' argument in the Court of Appeals, the cited passage of petitioners' brief in the Fourth Circuit reads as follows:

> "Some of the evidence reveals what may conceivably be unfair labor practices, but these are relevant because the cases involve the good faith of the IP in the performance of his constitutional duties and a showing of the facts bearing on his state of mind is legitimate to establish the ultimate conclusion of violations of fiduciary duty. Such facts are merely evidentiary on the question of the International's motivation in revoking the charter and performance of its fiduciary obligations which are the crucial questions under the contract and under the law: [The footnote at this point reads] *It is submitted that this is the reason the court below erred in failing to make a finding with respect to the bad faith bargaining of the Maryland Chapter of NECA* [citation to evidence omitted]. The failure to make the finding was not crucial because the court found ample other evidence on the ultimate question of the IP's motivations and purposes. The court's refusal to make a finding on the Maryland Chapter's bad faith bargaining seems inconsistent with its willingness to make a finding as to the relationship of the employers to Local 24 ([Jt.] App. 30). Actually this finding is proper because the showing that Freeman, who should have been a good shepherd, was actually in league with the wolves, bears on his good faith in revoking the charter and the credibility of his protestations of good faith. [The footnote ends at this point.] *In any event, the District Court went farther out of its way than was really necessary to avoid conflict with the NLRB and carefully refrained from basing its decision on any ground that could conceivably involve such conflict.*" (Emphasis supplied.)

In view of the conclusions of the Fourth Circuit, made without the benefit of specific findings of the District Court on these matters, the refusal of the District Court to make such findings is now indeed "crucial" and fully open here.

Respondents seek to suggest that the District Court indicated that if it were to make such findings they would have been adverse to petitioners (IBEW Br. in Opp. 18-19; Local 24 Br., p. 12). Respondents rely for this argument upon a colloquy in which the District Judge stated that he had found no conspiracy up to that point. This was before the evidence of the draft decision by the Council came into the case, and was based in part on the IP's denial that there had ever been any such decision, which denial the District Judge specifically found in his final opinion to have been false (Jt. App. 23).

(5) *Counsel Fees*

While the District Judge was critical of the attorney who represented the Local in the events leading to the strike, he found that that attorney's advice as to the construction of the Union Constitution though wrong in the event, had presented at least a "bona fide" "jury question" (Jt. App. 354, 372). Moreover, after the IP rejected the Local's proposal on July 12, before the commencement of the disciplinary hearing, to terminate the strike and submit to independent arbitration, and insisted upon submission of the Local's case to the Council, which was the instrument of his breach of his fiduciary duty, only the IP's misconduct was operative and the Local either had to file suit or submit to the IP's illegal purpose. For the litigation made necessary at that point solely by the IP's wrong, the Local engaged trial counsel (of record in this court), who had had no previous connection whatever with any of the parties or with the subject matter of the case. If, as is sub-

mitted, the petitioners are entitled to relief, and this litigation was made necessary by the oppressive conduct of the IP, they are also entitled on this account to counsel fees.

(6) *Unclean Hands*

The IBEW states flatly as a fact that the District Court found the hands of the leaders of Local 28 to be unclean (IBEW Br. in Opp. 6, n. 5, 8, n. 9). The District Court made no such finding, but said merely that the conduct of the leaders in representing to the members before the strike vote that they had the green light for a strike "*might be* sufficient to bar relief if we were dealing only with the rights of the officers and leaders of the Local" (Jt. App. 43). However, any misconduct of the officers during the prelude to the strike is washed out of the case by the Local's offer to terminate the strike on July 12 and submit to independent arbitration, and the IP's rejection of the offer and bringing of disciplinary action for the admitted essential purpose of forcing the Local to the Council, where in fact the Local had already been sold out as to wages and would be forcibly supplanted as the collective bargaining agent of its members for the indefinite future. It offends fundamental justice to permit the International, whose sin has been worse than that of the local's leaders, to cast the ultimate stone of expulsion either on the local, or its leaders.

The numerous other allegations of violation of the union constitution by petitioners, said to amount to unclean hands, are irrelevant. These alleged additional violations by the Local (e.g., abrogating the Local's contract with the Maryland Chapter without consent of the IP) were not the subject of any charges, were not the basis upon which the IP acted, and "cannot be used to justify the

decision of the IP" (Jt. App. 37-8, n. 43). Moreover, the authorities are unanimous that breach of the IP's abiding fiduciary duty, and illegal purposes and violations of the IBEW Constitution by him, completely forfeit any right of the International to discipline the Local or its leaders, apart from the fairness of the hearing, even if it be conceded that the Local was guilty of a violation of the literal language of the Constitution. See the authorities cited at App. 30-31. In any event, the doctrine of unclean hands does not apply where it would defeat a constitutional or statutory or other strong public policy. 30 C.J.S., Equity 490-91, 19 Am. Jur., Equity, sec. 469. Cf. Restatement of Trusts (2d Ed., 1959) sec. 253 (wrongful dealing with trust property by beneficiary does not relieve trustee of fiduciary obligation).

Conclusion

For the reasons set forth in the petition and in this reply, certiorari should be granted. The important questions raised with regard to the fundamental rights of the rank and file of American labor under the recent Landrum-Griffin Act, which occupied the Congressional spotlight for such a substantial period of time, should be authoritatively settled.

Respectfully submitted,

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